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Supreme Court, U.S.
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No.: _____

IN THE

Supreme Court of the United States

October Term, 1986

RONALD USTICA,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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On the Petition

Questions Presented

1. Whether the trial court's refusal to declare a mistrial in the wake of the highly publicized mid-trial murder of co-defendant Paul Castellano deprived petitioner of a fair trial before an impartial jury?

2. Whether the trial court's failure to conduct individual inquiry of the jurors as to their exposure to news accounts of the suicide of a critical government witness during deliberations was fatally prejudicial to petitioner's right to a fair trial?

List of Parties

Apart from the petitioner, the other parties involved in the trial from which this petition results were Paul Castellano, Anthony Gaggi, Joseph Testa, Henry Borelli, Peter LaFroscia, Anthony Michael Senter, Richard Mastrangelo, Ronald Turekian, and Edward John Rendini.

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IN THE

Supreme Court of the United States

October Term, 1986

RONALD USTICA,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Ronald Ustica respectfully prays that a writ of certiorari issue to review that part of a judgment of the United States Court of Appeals for the Second Circuit entered on January 21, 1987 affirming his conviction for violating 18 U.S.C. §§ 371 and 2314.

Opinions Below

The opinion of the Court of Appeals, reported as *United States v. Gaggi*, 811 F.2d 47 (2d Cir. 1987), is reprinted in the Appendix at pages 1a-34a. The order of the Court of Appeals denying petitioner's petition for rehearing appears in the Appendix at pages 35a-36a.

The opinion of the District Court, reported as *United States v. Gaggi*, 632 F. Supp. 1019 (S.D.N.Y. 1986), appears at 37a-48a.

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered on January 21, 1987. A timely petition for rehearing was denied on March 13, 1987, and this petition for a writ of certiorari was filed within sixty days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

Statutory Provisions

Title 18, United States Code:

§ 371. Conspiracy to commit offense or to defraud the United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

§ 2314. Transportation of stolen goods, securities, moneys, fraudulent State tax stamps, or articles used in counterfeiting

Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud . . . Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.—

Statement of the Case

The trial at issue in this appeal involved allegations, originally contained in a 91-page, 78-count indictment, which was divided into a number of trials, that various defendants named in the original indictment had participated in a stolen car operation. Count One of the severed indictment alleged that from June 1, 1972, through February 28, 1983, Paul Castellano, Anthony Gaggi, Joseph Testa, Henry Borelli, Peter LaFroscia, Anthony Senter, Ronald Ustica, Richard Mastrangelo, Ronald Turekian, and Edward Rendini conspired with themselves and others to violate 18 U.S.C. § 2314. The goal of this conspiracy was the shipment of stolen automobiles and automobile engines to Kuwait.[1] Counts Two through Eighteen charged the same individuals named in Count One, this time including Borelli,[2] with the actual transport of the stolen automobiles and engines. Each of these counts was based upon a separate shipping invoice.

Counts Nineteen through Twenty-two charged only Ronald Turekian with a violation of the mail fraud statute. It was alleged that Turekian defrauded the Aetna Insurance Company by submitting false insurance claims on cars that had been stolen.

Finally, Count Twenty-three charged Joseph Testa, Anthony Senter, Ronald Ustica, and Henry Borelli with conspiring, in violation of 18 U.S.C. § 241, to violate the constitutional rights of Ronald Falcaro and Kahled Fahd Darwish Daoud. It was alleged that these defendants

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[1] Henry Borelli was originally charged with participation in this conspiracy. However, a motion to dismiss this charge on double jeopardy grounds was granted on consent because of Borelli's 1981 guilty plea, in the United States District Court for the District of New Jersey, to participation in the same conspiracy.

[2] Borelli was not named as a defendant, however, in Count Eighteen, because this charge was also barred by his prior plea in New Jersey.

murdered Falcaro and Daoud, thereby interfering with their constitutional rights, as alleged citizens, to be witnesses in a federal proceeding.

In the end, Anthony Gaggi and Peter LaFroscia were convicted of the conspiracy charged in the indictment and acquitted on all charges of substantive violations of § 2314. Both defendants were sentenced by Judge Kevin Duffy to the maximum term of five years imprisonment. Henry Borelli was convicted on the civil rights count, as well as all 15 charges against him of substantive violations of § 2314, and *sentenced to consecutive terms of life imprisonment and 150 years imprisonment.* Ronald Ustica was convicted of the civil rights violation, as well as all the stolen car charges, and sentenced to concurrent terms of life imprisonment on the civil rights count and 10 years imprisonment on the stolen car counts.[3] Edward Rendini, who was not charged with the civil rights violation, was convicted on all the charges involving the stolen car allegations and sentenced to maximum consecutive terms of imprisonment on each count for a total 165-year term of incarceration. Ronald Turekian was convicted on the conspiracy and mail fraud charges, acquitted on the § 2314 charges, and sentenced to concurrent terms of five years imprisonment. Richard Mastrangelo's motion for a judgment of acquittal after the conclusion of the government's case was granted by Judge Kevin Duffy. The jury acquitted Joseph Testa and Anthony Senter on all charges involving stolen cars and was unable to reach a verdict on the civil rights count. Finally, as anyone who reads the newspaper knows, the jury reached no verdict as to Paul Castellano because he was murdered during the trial.

On appeal, Borelli's and Ustica's conviction for violating § 241 was reversed. The rest of the convictions were affirmed.

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[3] Ustica was also sentenced to a concurrent term of five years for his conviction on the conspiracy charge.

Statement of the Facts

A. The Government's Witnesses

As the various petitions submitted will show, this case was an unusual one for many reasons, including the fact that the lead defendant, Paul Castellano, was the victim of a highly publicized murder. In addition, this case was different from many others because the government did not rely upon any electronic surveillance. Time and time again, this Court is confronted with cases where defendants have literally convicted themselves with their own words. This is not so here. Rather, in this case, the government almost exclusively relied upon a rogue's gallery of witnesses. Although there was some corroborative evidence in the form of surveillance photographs, handwriting analysis, and the like, the government will have to concede that its case rested upon the credibility of its three main accomplice witnesses: Vito Arena, Dominick Montiglio, and Frederick DiNome.[4] Accordingly, even before discussing the substance of their testimony, it is important to focus upon these witnesses as individuals. Plainly stated, it would be difficult, indeed almost impossible, to find a trio of more reprehensible and dishonest men.

1. Vito Arena

Vito Arena, whom fellow witness Frederick DiNome described as a "liar" (T. 4751-52),[5] testified at this trial pursuant to a plea agreement which permitted him to plead guilty to federal allegations of murder, prostitution, and car theft, as well as charges of armed robbery in three different New York State jurisdictions. (T: 1295-96) For all of these crimes, he received an 18-year federal

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[4] There were four other accomplice witnesses -- William Kampf, Matthew Rega, Philip Masi, and Joseph Bennett -- who testified at the trial. However, their testimony was of only tangential importance.

[5] Numbers preceded by the letter "T" refer to pages of the trial transcript.

sentence (T: 1292) and concurrent state sentences of three and a half to seven years from a Brooklyn court, three to six years from a Suffolk County court, and three to six years from a Nassau County court. (T: 1296) These crimes could have resulted in a lifetime of prison for Arena. (*See* T: 1576 *et seq.*)

Arena's plea bargain also included a promise that his associate in the robberies, and lover, Joseph Lee, would receive only a one-year sentence for participation in a number of armed robberies. (T: 1296-97) In addition, and very significantly, Arena, at the time of his testimony, had a motion for reduction of sentence, pursuant to Fed. R. Crim. P. 35, pending before his sentencing judge. (T: 1563) Incredibly, when asked whether he wanted the government's help in securing a sentence reduction, Arena responded: "I really couldn't care less." (T: 1564) The absurdity and apparent dishonesty of this response does not even merit a comment. Nonetheless, it should be noted that, just two months before his testimony at this trial, Arena called a federal investigator and insisted that, after testifying at this trial, the government would be obligated to appear in court and assist him with his application for a sentence reduction. (T: 1597-98)

Yet another indicator of Arena's credibility is the manner in which he upheld his agreement to "cooperate" with the government. At various times, Arena insisted upon (1) a barber chair being placed in his unit (T: 1761); (2) his Bruce Springsteen records being sent to him (T: 1765); (3) Joint accommodations with his lover, Joseph, "Joey" Lee, (4) *Joey Lee's teeth being fixed "to improve his appearance"* (T: 1765-66); and (5) *an operation to have the fat sucked out of his face, chin, and neck, so that he would not look like a "cyclops"*. (T: 1766-67) In sum, then, Vito Arena's character and credibility would be laughable, were it not for the fact that his testimony was substantially responsible for the conviction of these defendants.

2. Dominick Montiglio

Although he was not the colorful witness that Vito Arena was, Dominick Montiglio, Anthony Gaggi's

nephew, proved himself no more trustworthy. As detailed in co-defendant Anthony Gaggi's petition, Montiglio admitted that he had both lied to the government and *perjured* himself in the grand jury by failing to inculpate Paul Castellano and Anthony Gaggi in the alleged stolen car conspiracy. (T: 3863) This admission of perjury about the actual facts of this case is itself sufficient basis for rejecting Montiglio as a credible witness. *See United States v. Stofsky*, 527 F.2d 237, 246 (2d Cir. 1975), *cert. denied*, 429 U.S. 819 (1976) However, there is far more.

On March 7, 1983, Montiglio was arrested and charged with extorting $20,000, through the use of a gun, from a man named Winnick. (T: 3608-09) After beginning cooperation with the government (T: 3610), the complaint in that case was dismissed and Montiglio was set free. (T: 3609-11) Two years later, Montiglio entered into a formal cooperation agreement with the government, pleading guilty to a RICO charge. (T: 3611-12) This plea included, as racketeering acts, participation in the murder of a Vincent Governaro (*Id.*); bribery of a state witness (T: 3613-14); theft of handguns that were sent in interstate commerce (T: 3614); loansharking (T: 3615); the obtaining of property through the threat or actual use of force in 1974, 1975, 1976, 1977, and 1979 (T: 3616-17); conspiracy to distribute and possession with intent to distribute various controlled substances including marijuana, cocaine, and methaquaalone in 1983 (T: 3619-20); and possession of various handguns and other weapons from 1974 through 1983. (T: 3622) At the time of his trial, Montiglio had not yet been sentenced upon his guilty plea. Yet Montiglio, similar to Arena, had "no expectation at all" about what his sentence would be. (T: 3612)

Beyond his extraordinary criminal record and obvious motive for testifying in a manner that would please the government, Montiglio had other skeletons in his closet which bore upon his credibility. In particular, there was Montiglio's extensive drug use. He began using cocaine in 1977 and continued using it through 1984. By his own admission, he had "a bad habit." (T: 3650) In addition, he used marijuana (T: 3653) and

substantial amounts of quaaludes. (*Id.*) From 1979 through 1983, he was inhaling, on the average, seven grams of cocaine a week. In fact, he ultimately created a hole in the septum of his nose that was so big one could see "light through it." (T: 3657) Not surprisingly, some of his cocaine use took place after his March, 1983, initial decision to cooperate with the government. In 1983, when he first spoke to the government, he stated that "I am never going to get myself in that position," referring to cocaine abuse. (T: 3706) Despite saying this and despite *promising* that he would not violate the law anymore, he continued to use and sell the drug. (T: 3707; 3710)

Hence, similar to Arena, Montiglio showed himself to be a thoroughly dishonest and distasteful witness. Plainly stated, he obviously was willing to say anything in order to help himself.

3. Frederick DiNome

Frederick Di Nome's credibility was perhaps described by Vito Arena. Noting that "Freddy's credibility is shit" (T: 1776), Arena testified that DiNome forced his own child into sexual acts (*Id.*); forced his own and other children to observe sexual acts between girls and horses (*Id.*); had expressed a desire to kill police officers (T: 1777); used marijuana, cocaine, and nitrous oxide frequently (*Id.*); hated Hassidic Jews and blacks so much that he killed a number of them and threw bleach in the faces of black people waiting at bus stops (T: 1778-79); and cut off the heads of dogs. (T: 1779) Even Vito Arena made clear that he could not understand how the government could consider DiNome to be a reliable witness. (*Id.*)

Arena's doubts about DiNome were well grounded. As with Arena and Montiglio, DiNome had much to gain from testifying in a manner that pleased the government. By pleading guilty to one RICO offense in return for his agreement to cooperate with the government, DiNome managed to collapse a possible 455 years of prison exposure into a RICO plea with a maximum possible term of 20 years imprisonment. (T: 468-87) In addition,

while in federal custody, DiNome used drugs and stole government property. He did not expect to be charged for these crimes. (T: 4701-02)

DiNome, too, was also a highly unbelievable witness. His history of drug abuse, bizarre criminal activity, and extraordinarily strong motive for lying in order to please the government hardly lent credence to his testimony.

These three witnesses were the heart and soul of the government's case. In its brief, the government will undoubtedly make claims of substantial corroboration of their testimony. Yet, the simple truth here is that there would have been no prosecution, and certainly no conviction, without these witnesses. Even the government cannot deny this fact. Hence, none of the errors complained of in this brief can be deemed harmless. Where, as here, the government's case rests upon testimony of such untrustworthy and genuinely morally reprehensible individuals, any guilty verdicts rendered must necessarily be viewed as precarious.

B. The Stolen Car Conspiracy

The government's theory of the case postulated the existence of a corporate-like stolen car conspiracy. According to the government, the leader of the organization was Paul Castellano and his "executive vice president" was Anthony Gaggi. (T: 6246) No witness ever testified that these individuals had actual hands-on involvement in the stealing of automobiles. Rather, the government's proof, if believed, showed that an individual by the name of Roy DeMeo, now deceased, supervised the day-to-day operations of the alleged stolen car ring. It was DeMeo who made the key day-to-day decisions for the group (*see, e.g.,* T: 1472, 1486, 1512, 4451-52) and mediated disputes among those below him. (*See, e.g.,* T: 1527) DeMeo also presided over weekly Friday night meetings where money was divided up. (T: 3470-72)

Underneath DeMeo were the defendants in this case, as well as some of the government's witnesses and some other individuals. According to the government's proof,

they all participated, in varying combinations, in a number of related stolen car operations that spanned from 1972 through 1983. In the early 1970s, the conspiracy surfaced in its first form in a stolen car operation run by a John Quinn. Neither Borelli, Ustica, nor Rendini were said to be involved in Quinn's operation. Ustica and Rendini had no involvement with Quinn, and Henry Borelli was said only to have been a one-time purchaser of Quinn's stolen cars. (T: 216) The Quinn phase of this conspiracy came to an end in 1977, when, on supposed orders from Roy DeMeo (T: 432), Peter LaFroscia allegedly killed Quinn, and his girfriend Sherrie Golden, out of fear that Quinn was cooperating with law enforcement authorities. (*See* T: 266-70)

After Quinn's death, other supposedly related stolen car operations continued. However, the government's proof did not show that any defendant other than Turekian was involved.

In 1978 the alleged activities at the heart of the indictment in this case began. The government witnesses testified that, from 1979 through 1983, all of the defendants on trial were involved in a scheme to steal cars and then export them to Kuwait. Garages first on Glenwood Road, then on Linden Boulevard, and near the end, on Empire Boulevard were used to receive cars that were allegedly stolen by Frederick DiNome, Ronald Turekian, and Vito Arena. (T: 4453) At the various garages, the dash boards on the cars would be pulled off and new vehicle identification numbers would be attached to the car, emission stickers would be changed, and new keys would be made for the trunk and the ignition. (T: 4454) According to Frederick DiNome, Henry Borelli's functions in this operation included typing the new vehicle identification number tags (T: 4454) and the federal emission control stickers. (T: 4469-71) It was alleged that Edward Rendini, on occasion, provided blank certificates of title for the automobiles which, in fact, were not required or *used* in the Kuwait operation. (T: 2136-38) After the cars were altered, they were then driven by DiNome, Arena, Borelli, and Rendini to Ronald Ustica, who had a legitimate automobile business in Long Island.

(T: 1362-63) From there, they were loaded onto a boat and shipped to Kuwait by Ustica under the name "Compass Forwarding." (T: 1363)

This initial pattern for the Kuwait scheme continued until October of 1979, when Ronald Turekian was visited by law enforcement officers. (T: 4514) At Ustica's request, Compass Forwarding was no longer used as the shipping company for the stolen cars. (T: 4516) Rather, Henry Borelli, with the assistance of Edward Rendini's introduction to a friend who worked at a bank (T: 4516), allegedly formed a new corporation. Using the name Robert Each (T: 4516-17), Borelli became the principal of "Big A Auto Exporters." (T: 4516-17) With this change in structure, things continued as they had in the past until April of 1980, when a customs officer, Joseph Tedeschi, discovered that a shipment of 100 cars from Big A Auto Exporters was made up of stolen cars. (T: 2307) As a result of this discovery, Henry Borelli and Frederick DiNome pleaded guilty to participation in a stolen car conspiracy involving the 100 automobiles that were uncovered by Officer Tedeschi. (T: 4616)

After the discovery of the stolen cars in April of 1980, and a subsequent raid on the Empire Boulevard location, an effort was made to get the car operation going again at the McGregor Custom Coach Company on Eastern Parkway in Brooklyn. (T: 1471) However, only about 10 cars were stolen before this operation ceased. (T: 4589) It was here that the government's proof regarding the stolen cars came to an end.

REASONS FOR GRANTING THE WRIT

1.

The Trial Court's Refusal to Declare a Mistrial in the Wake of the Highly Publicized Mid-Trial Murder of Co-Defendant Paul Castellano Denied Petitioner a Fair Trial Before an Impartial Jury.

A. The Murder of Paul Castellano

On December 16, 1985, at approximately 5:30 p.m., co-defendant Paul Castellano and his driver, Thomas

Bilotti, were shot and killed, by three assailants in a fusillade of gunfire, while exiting a car in front of Spark's Steak House on East 46th Street in midtown Manhattan. In the wake of this brutal (and gruesomely public) double murder, an immediate firestorm of publicity consumed the Metropolitan New York area. Newspapers competed with radio and television in attempting to outdo one another in sensationalism and garishness in an attempt to cater to the public's morbid curiosity about what was characterized as "an execution-style Mob 'hit'." This media extravanganza was so extraordinarily all-pervasive, both in terms of the extent of its coverage and the protracted length of time that it continued unabated, as to lie virtually beyond the vocabulary of exaggeration.[6]

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[6] The catastrophic impact of this incident and the garish manner in which it was sensationalized by the media (complete with photographs of the body of the decedent at the scene of the shooting) can be seen by the following small sample of stories and headlines published immediately in its wake, *see, e.g.*, *Godfather Rubbed Out* (N.Y. Post, 12/17/85); *Mafia's No. 1 Blown Away* (*id.*); *Method Behind Mob Madness* (*id.*); *The Rise and Fall of an Underworld Boss* (*id.*); *Tide Was Turning His Way in Court* (*id.*) (a direct reference to the instant trial); *Rubout* (N.Y. Daily News, 12/17/85); *Mob Hits Big Paul* (*id.*); *To Mob: A Big Head Ache* (*id.*); *Feds Suspect a Family Affair* (*id.*); *Big Paul Follows a Long Trail of Blood: A Gangland Execution -- and Echoes of Shots Fired Before* (*id.*); *Organized-Crime Chief Shot Dead Stepping From Car on E. 46th St.* (N.Y. Times, 12/17/85); *Gang Guns Down Mob Boss* (N.Y. Newsday, 12/17/85); *Mob Rivals OKd Hit on 'Big Paul'* (N.Y. Post, 12/18/85); *Inside Mob Mogul's Executive Suite: Gambino Inc.* (*id.*); *Vast Empire That Rakes in Hundreds of Millions of $$* (*id.*); *Mistrial to Hinge on News Reports: Judge* (*id.*) [a direct reference to the instant trial]; *Family Tree Shows Likely Suspects* (*id.*); *Mob Families Okayed Hit* (N.Y. Daily News, 12/18/85); *Big Paul Simply Knew Too Much: A Family Affair: Probers* (*id.*); *That Kills It, Lawyers Plead* (*id.*); *Mob 'Law': It's Real as Death* (*id.*); *Police Tailing Queens Man in Murder of Gambino Boss* (N.Y. Newsday, 12/18/85); *Slaying Imperils Mob Trial* (*id.*); *Imported Rubout* (*id.*); *Expert Says Crime Family Chiefs Sanctioned Slaying of Castellano* (N.Y. Times, 12/18/85); *Gambino Trial is Unfolding Haltingly* (*id.*) [a direct reference to the instant trial]; *Cuomo Condemns Use of 'Mafia' for Describing Organized Crime* (*id.*); *Respectability and Crime: Private Life and Violent Death of Paul Castellano* (*id.*); *Mob Assassins' Only Choice - Kill or Be Killed; Secret FBI Tapes Bare Three-Year Feud*

(footnote continued on following page)

At the time of his death, Castellano had been on trial since September 30, 1985, with petitioner and his co-defendants, on charges that, *inter alia,* they were all members of the car theft conspiracy. Not surprisingly, the news media gave great prominence not only to the instant trial -- and its participants -- but also to other aspects of the late Mr. Castellano's life and that of his co-defendants -- matters that, of course, hitherto had been kept from the jury by careful evidentiary rulings of the trial judge. Judge Duffy's efforts to try a "clean case" (T. 12), therefore, went completely by the boards with the Castellano murder. Literally within one-half hour of the shooting, news flashes interrupted regular television programming, bulletins were broadcast nationwide over ABC-TV's nationally-telecast Monday Night Football broadcast, and a full-blown media event was in the making.

Obviously, there is no tangible means by which we can recreate in this brief the many ruthless comments,

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(footnote continued from preceding page)
with Castellano (N.Y. Post, 12/18/85); *Gangland 'Who's Who' at Wake* (*id.*); *Church Nixes 'Big Paul' Rites - Because of the Public Nature of the Crime Syndicate he Allegedly Headed* (*id.*); *Church: Count Us Out of Rites for Castellano* (*id.*); *Giuliani: Gov Stirs Bias With 'No Mafia' Remark -- U.S. Attorney says Mob's Existence is a 'Tragic Reality' and to Deny it is 'Silly'* (*id.*); *Mobsters Shot Down on Tapes* (N.Y. Daily News, 12/19/85); *Mafia - Pros & Cons - Gov Biaggi v. Giuliani* (*id.*); *Slay Site Sealed* (*id.*); *A Hushed Good-bye* (*id.*); *Yes, Mario, There is a Mafia* (*id.*); *Hundreds Pay Respects to Slain Mobster* (N.Y. Newsday, 12/19/85); *Mob Rubout Jolts Halls of Justice* (*id.*); *'Big Paul' is Buried After Secret Funeral* (*id.*); *Big Paul Buried Hastily on S.I.; Mass is Barred* (N.Y. Daily News, 12/20/85); *How the Church Decides* (*id.*); *Why Church Nixed Mass for Mobster* (N.Y. Newsday, 12/20/85); *Cardinal Denies Mob Boss Funeral Rites of Church* (*id.*); *Church Teaches Lesson* (*id.*); *The Soul of Indiscretion* (*id.*); *Castellano Denied Funeral Mass in Church by Cardinal O'Connor* (N.Y. Times, 12/20/85); *New Breed Said to Emerge in Organized Crime* (*id.*); *9 Linked to Mafia Are Accused of Bilking Legitimate Business* (*id.*); *After 'Big Paul' - The Mob's New Direction* (New York Magazine, 1/6/86).

In addition to coverage in the print media, of course, radio and television reportage of the incident was, if anything, even more pervasive, continuing the media saturation blitz for weeks after the incident literally on a daily basis.

editorials and news flashes which drenched the New York Metropolitan area, for literally weeks on end, with the most unseemly and antagonistic publicity. In support of their motion for a mistrial, defense counsel furnished the trial court with a compendium of newspaper articles and broadcast transcripts which is almost the size of the Manhattan telephone directory. It has been made a part of the Joint Appendix submitted to the Court of Appeals and it is only by perusing it that this Court can hope to appreciate the full flavor of the rampant antagonism and the length and breadth of media (and perforce, community) preoccupation with the Castellano murder.[7] However, some of the obviously prejudicial categories of information disclosed to the public -- and the jurors in the instant case -- may be listed as follows:

1. The public was told that the case on trial was only a small part of a larger indictment in which the defendants were charged with loan sharking, twenty-five murders, the distribution of drugs, and the sale of weapons.

2. Paul Castellano was killed because "the Mob" felt he was going to be found guilty.

3. The Gambino Crime Family takes in "hundreds of millions of dollars" a year and costs the people of New York, individually, thousands of dollars because of kickbacks to "the Mob" in the restaurant business; collection of garbage; and construction industries.

4. Secret electronic surveillance conducted in Paul Castellano's home showed that he was guilty of a number of other serious crimes.

5. The Catholic Church refused to allow Castellano's burial in a Catholic cemetery "because of . . . his alleged connection to the organized crime syndicate."

Not surprisingly, the trial court's inquiry of the individual jurors the next morning proved counsel's

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[7] At the Court's request, we will forward a copy of the Appendix.

fears to be correct. On December 17, 1985, defense counsel moved for a mistrial as to the remaining co-defendants based upon the shocking events of the previous night. (T: 4038-52) The trial court took counsel's application under advisement and proceeded to conduct an inquiry of each of the jurors. (T: 4054-94) All but one acknowledged either seeing newscasts or reading newspaper articles (or both) about Paul Castellano's murder. (*Id.*) All of the jurors indicated that, despite the shocking events, they could be fair throughout the rest of the trial, despite the prejudicial publicity. (*Id.*) At that time, though, the trial court thought it prudent to adjourn the trial for the Christmas holidays in order, *inter alia*, to allow the smoke to clear. What transpired over the next two weeks is perhaps best expressed in the trial judge's own words:

> [A]s it had always been my intention to suspend the trial over Christmas and New Year's weeks, I adjourned all proceedings until January 6, 1986 at which time I heard arguments on the mistrial motion. In the interim, there were numerous newspaper articles and T.V. and radio reports regarding Castellano's murder. This publicity included details about the killings and speculation about Castellano's background and the cause and possible ramifications of his death. The publicity surrounding Castellano's death did not abate for quite a few days, in part due to the fact that certain law enforcement personnel considered it appropriate to be highly visible and conduct numerous interviews wherein they discussed their various theories for Castellano's death,[8] and also

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[8] Indeed, the extensive law enforcement commentary that occurred both prior to and during this trial was precisely of the sort that has recently been strongly criticized in a report issued by the Ad Hoc Committee on Pretrial Publicity of the Association of the Bar of the City of New York. Condemning recent trends towards "trial by press conference," the Committee supported the strengthening of disciplinary rules against participants -- especially prosecutors -- who have continued to engage in this unseemly practice. *See* "Bar Report Recommends Curbs of Pretrial Comments to Media: Sanctions Sought For Trial By Press Conference," New York Law Journal, July 18, 1986, p. 1, cols. 3-4.

because the media reported that the Archdiocese of New York denied a Mass of Christian Burial for Castellano.

On January 6, 1986, with the publicity having continued over the ensuing three weeks largely unabated, the trial court conducted a follow-up *voir dire* of each juror. (T: 4151-4272) The jurors once again reiterated their individual beliefs that the shocking events of the previous weeks would not interfere with their ability to remain fair and impartial. Nonetheless, virtually all of them admitted to having been barraged by media reports and almost all knew of both the allegations that Castellano had been killed in some sort of organized-crime "gang warfare" and that Cardinal O'Connor had denied him a Mass of Christian Burial. (*Id.*)

Based upon this colloquy with the jurors, the trial court rejected defense counsel's arguments that, despite the best of intentions, there was simply no way that these jurors could realistically put out of their collective minds both the shocking fact of the Castellano murder as well as the collateral revelations about the defendants and organized crime from which they had previously been so sedulously shielded. (*See, e.g.*, T: 4121-50; 4273-4300) *See* a.

B. The "Collective Impact" of the Castellano Murder, the Concomitant Prejudicial Publicity, and the Extra-Record Information to Which the Jurors Were Exposed Denied Petitioner a Fair Trial Before an Impartial Jury.

It is one of the fundamental cornerstones of American jurisprudence that criminal defendants are entitled to a fair trial before a neutral and impartial jury. *Irwin v. Dowd*, 366 U.S. 717, 722 (1961); *Marshall v. United States*, 360 U.S. 310, 312 (1959); *Remmer v. United States*, 347 U.S. 227, 229 (1954). Accordingly, exposure of jurors to adverse publicity either prior to or during trial may create such serious prejudice as to violate a defendant's right to have his guilt or innocence tried before an appropriately impartial tribunal. *Chandler v. Florida*,

449 U.S. 560, 574 (1981); *Murphy v. Florida*, 421 U.S. 794, 799 (1975).

While the trial judge has a substantial arsenal of procedural devices at his disposal to protect a defendant's rights to a fair trial by insulating the jury from mid-trial publicity, *e.g.*, cautionary instructions, mid-trial *voir dire* and, where necessary, sequestration (*see* 1 E. Devitt & C. Blackmar, *Federal Jury Practice and Instructions* § 4.06 (3d ed. 1977) (and cases collected therein)), it has nevertheless been recognized that there are still instances, however rare, where nothing short of a mistrial is sufficiently capable of vitiating the taint of adverse and prejudicial publicity. *See United States v. Williams*, 568 F.2d 464 (5th Cir. 1978); *United States v. Richardson*, 651 F.2d 1251 (8th Cir. 1981); *United States v. Titsworth*, 422 F. Supp. 587 (D.Neb. 1976). This is one of those rare instances.

The questions presented by petitioner in this matter can be easily stated: whether the trial should have been continued in the wake of the Castellano murder and the firestorm of prejudicial publicity that continued unabated literally for weeks on end merely because the jurors represented to the trial court that, despite the shocking extra-record revelations to which they had been exposed, they nonetheless believed that they could still be fair?

No one can deny the shattering impact that this constant and uninterrupted barrage of newspaper, magazine, television, and radio coverage had on all the trial participants -- parties, lawyers, jurors, court personnel, and the trial judge alike. Given the terrifying descriptions of organized crime that were offered, the gruesome revelation of twenty-five extra-record murders that these defendants were accused of in separate aspects of the case not before the jury, the controversy surrounding the Catholic Church's refusal to bury Paul Castellano in a Catholic cemetery, and the vivid accounts of former bloody gang wars that have raged throughout New York's history, it is impossible to imagine how, despite the best of intentions, any juror's neutrality possibly could have survived in the face of this harrowing publicity.

Rather, the conclusion is inescapable, to paraphrase Learned Hand, that the trial judge's cautionary instructions, however well meaning, for the jury to disregard all that it had seen and heard was a "recommendation to the jury of a mental gymnastic which is beyond, not only their powers, but anybody else's." *Nash v. United States*, 54 F.2d 1006, 1007 (2d Cir. 1932).

In *Marshall v. United States, supra,* the Supreme Court recognized the overwhelming likelihood that prejudicial publicity reaching jurors during trial would have a devastating impact on a defendant's ability to be judged in a fair and impartial manner. In that case, seven jurors read newspaper accounts disclosing defendant's prior criminal record, evidence which was not otherwise admissible at trial. The trial judge examined the seven jurors, each of whom assured the court that they would not be influenced by the articles and could remain fair and impartial. The Supreme Court nonetheless reversed and ordered a new trial:

> . . . We have here the exposure of jurors to information of a character which the trial judge ruled was so prejudicial it could not be directly offered as evidence. The prejudice to the defendant is almost certainly to be as great when that evidence reaches the jury through news accounts as when it is a part of the prosecution's evidence. (Citations omitted.) It may indeed be greater for it is not tempered by protective procedures.

360 U.S. at 312-13. The *Marshall* rule has been applied by numerous other courts, all of which have held that where jurors are exposed either to news media accounts or any other form of extra-record information that is (in any respect) prejudicial, a new trial is warranted, even in the face of jurors' self-serving promises of impartiality.

In *United States v. Williams, supra,* the Fifth Circuit held that where two jurors saw a television newscast during trial reporting that the defendant previously had been convicted at a prior trial on the same charge, and that a new trial had been ordered because of "erroneous testimony," the second conviction had to be reversed as well. The Court, per Judge Thornberry, held that neither

the fact that the two jurors said they could disregard the newscast and decide the case solely on the evidence adduced in court, nor the trial court's standard admonition to disregard everything not heard in open court, could cure the prejudice:

> The fact that the two jurors said they could disregard the newscast and decide the case solely on the evidence adduced in court is not controlling. In *Marshall*, the affected jurors gave similar assurances, yet the Supreme Court overturned the conviction. The effect of exposure to extrajudicial reports on a juror's deliberations may be substantial even though it is not perceived by the juror himself, and a juror's good faith cannot counter this effect. For that reason, we have recognized that such assurances from jurors may not be adequate to eliminate the harm done by a news report. *United States v. Schrimsher*, 493 F.2d 848, 854 (5th Cir. 1974). We think that is the case here, *i.e.*, that the juror's statements are insufficient to obviate the problems of fairness caused by the news reports.
>
> Nor are we convinced that the prejudice was corrected by the court's standard admonition to disregard everything not heard in court . . . . As the court said in *United States v. Schrimsher, supra*, 493 F.2d at 854, some information "is so prejudicial that curative instructions . . . would not be adequate to eliminate the harm done" by a news report.

The news accounts of the Castellano homicide squarely placed before the jury issues which the trial court had steadfastly deemed inadmissible. First, the allegations that the defendants are associated with the "Mafia" had been persistently excluded. The care taken by all counsel to avoid any references to organized crime were irreparably shattered. The prejudice which inevitably resulted from such knowledge is obvious. Instead of the jurors believing that defendants were part of a "group" or "organization," they were presented with

extra-record proof, which the defense had no opportunity to contest, that the defendants, through their association with Paul Castellano, were clearly members of the "Mafia." They now knew through extra-record sources that Castellano was the "boss" of the Gambino family and "boss of bosses" of the Mafia in the United States. Moreover, media reports funded speculation that "younger members" of the Gambino Family had been behind the assassination and the jurors in this case knew full well that all but one of the co-defendants here were in their twenties and thirties. This virulent prejudice could not be cured by judicial instructions, no matter how conscientiously given. *See United States v. Lord*, 565 F.2d 831, 837-39 (2d Cir. 1977); *United States ex rel. Bloeth v. Denno*, 313 F.2d 364, 372 (2d Cir. 1963).

Perhaps even more devastating was the repeated references to the other crimes that each of the defendants was charged with: loansharking, twenty-five murders, distribution of drugs, and sale of weapons. Under ordinary circumstances, had this come to the attention of jurors in a less celebrated trial, a mistrial might properly be granted. *Cf. United States v. Hillard*, 701 F.2d 1052, 1064 (2d Cir.), *cert. denied*, 461 U.S. 958 (1983). Finally, of course, the consequences of the Catholic Church's refusal to allow Paul Castellano to be buried in a Catholic cemetery because of his membership in organized crime was damning to all the defendants.

The Second Circuit recognized that the Castellano murder "complicated the proceedings immeasurably." (4a). The Court concluded, however, that the extraordinary publicity that followed Castellano's murder did not deprive defendants of a fair trial because Judge Duffy's voir dire brought assurances from the jurors that they could be impartial.

However, as the Court also recognized, *Marshall v. United States*, *supra*, and its progeny do hold that, in some circumstances, prejudicial publicity can be so overwhelming that nothing short of a mistrial can ensure the defendant's right to a fair trial. Here, the Court distinguished *Marshall* by holding that it is limited only to the situation where the jury learns about a defendant's prior criminal record. The Court then went on to hold

that Judge Duffy "made a clear finding that not a single juror had been exposed to information regarding the remaining defendants . . . [and] [a]ppellants' counsel conceded at oral argument that the publicity generated by the Castellano murder did not relate directly to the issues at stake in the ongoing trial." (10a).

In reaching this conclusion, the Court overlooked a number of crucial factual and legal matters. *First, Marshall* cannot be limited to those circumstances where publicity involves a defendant's prior conviction. In *United States v. Richardson, supra,* for example, the Court held that where jurors had heard prejudicial newscasts about the wounding of a prospective government witness, followed by the appearance of the witness in court testifying from a wheelchair, voir dire and cautionary instructions were inefficient and the trial court abused its discretion in failing to grant a mistrial. 651 F.2d at 1253-54. Moreover, in this case, the media accounts did reveal that Peter LaFroscia was serving a prison sentence "on other convictions" (T: 4134) and that Edward Rendini recently had been arrested on narcotics charges. (*Id.*) Hence, information about some of the defendants' criminal records was disseminated.

Indeed, as a matter of common sense, the Second Circuit's formulation of the *Marshall* rule cannot be correct. Suppose, for example, a jury were to read media reports that a defendant, on trial for a white-collar crime, was the chief suspect in a series of rapes. Surely, no amount of voir dire could ensure a fair trial under these circumstances. Yet, under the Second Circuit's formulation of the *Marshall* rule, there would be no basis for granting a mistrial.

Second, the Court erred in concluding that "the district judge made a clear finding that not a single juror had been exposed to information regarding the remaining defendants." (10a). While this statement is literally true, it does not accurately reflect what occurred at trial. The fact is that virtually every juror admitted to having been barraged by media reports and almost all knew of both the allegations that Castellano had been killed in some sort of organized-crime "gang warfare" and that Cardinal

O'Connor had denied permission for a Catholic funeral ceremony. Obviously, these media reports were also a comment upon the other defendants because the government took such great pains to stress that Paul Castellano was the head of the alleged stolen car *organization.* Hence, the same media brush that tarred Paul Castellano also tarred his co-defendants. This is made clear by the fact that Anthony Gaggi, the supposed "second in command," was convicted of the conspiracy even though he was not convicted of any substantive offenses -- a conviction that fit neatly into the government's theory that Castellano ran an organization that had a corporate-like structure.

Third, the Court misinterpreted counsel's supposed concession that "the publicity generated by the Castellano murder did not relate directly to the issues at stake in the ongoing trial." (10a). At argument, counsel conceded *only* that the publicity did not focus on the precise stolen car charges at issue in the trial. However, counsel consistently contended that the publicity was directly relevant to the charges on trial. For example, newspaper reports that Henry Borelli was a "hit man" and that Anthony Gaggi was the "only defendant of alleged rank" went directly to charges that there was a corporate structure at work here and that Borelli had murdered Falcaro and Daoud in furtherance of the stolen car conspiracy. Hence, there can be no doubt that the publicity gave all too much illicit credence to the government's theory of the case.

Finally, one cannot ignore the fact that the publicity generated by Castellano's murder was wholly inconsistent with Judge Duffy's decision to sever the case. At the beginning of trial, Judge Duffy made a determination that references to the "Mafia" and allegations of other criminal activity by these defendants would deprive them of their right to a fair trial. Unfortunately, the Castellano murder allowed all this evidence in through the back door. Hence, Judge Duffy's decision not to grant a mistrial was internally inconsistent. If these allegations about the defendants were too prejudicial to be put before the jury in an orderly, evidentiary fashion,

they were surely too prejudicial to be received in the form of newspaper reports.

In sum, the jurors' own self-serving declarations of impartiality cannot be considered dispositive. Rather, the Court must conclude that petitioner's right to a constitutionally impartial jury was irremediably tainted by the unavoidable publicity surrounding the Castellano murder as well as the concomitant other crimes evidence that was disclosed along with it -- evidence that otherwise would never have been brought to their attention. Accordingly, under the totality of circumstances of this extraordinary trial, the judgments of conviction must be reversed and petitioner provided a new trial before an untainted jury.

2.

The Trial Court's Failure to Conduct Individual Inquiry of the Jurors As to Their Exposure to News Accounts of the Suicide of a Critical Government Witness During Deliberations Was Fatally Prejudicial.

The sensational publicity connected with the December 16, 1985 murder of Paul Castellano was an obvious source of disruption of the trial and was inherently prejudicial to petitioner's right to be tried before an impartial jury, one untainted by extraneous and grossly prejudicial information. Two months later, however, in the midst of the jury's deliberations, yet another shocking incident occurred, one which could have only destroyed the jury's ability to remain impartial.

A. The Death of Frederick DiNome

On February 17, 1986 -- four days after jury deliberations had commenced -- radio reports and newspaper articles once again devoted headlines detailing the circumstances of the apparent suicide of Frederick DiNome. (T: 7188-89; 7257-58; 7301-02; 7316-17; 7331-32; 7345-46;

7375) Once again, the media blitz began anew.[9] Counsel immediately moved for a mistrial or, in the alternative, an individual *voir dire* of each juror in order to ascertain the extent of their exposure to this inflammatory and highly prejudicial material, coming as it did in the midst of deliberations. (T: 7259-64; 7290-91; 7316; 7331-39; 7345-46; 7375-82)[10]

The trial judge recognized the inherently prejudicial nature of this publicity, suggesting as it did that defendants were somehow responsible for the witness' death. (*See, e.g.*, T: 7189 -- 'there would be an awful lot of people in the world who would think that your clients might have some reason to at least wish him ill health, if nothing else.") Nonetheless, he refused an individual inquiry of each deliberating juror, as he had done after the Castellano murder, and simply contented himself with a brief general inquiry of the jurors en masse in open court and an admonition to avoid newspapers and radio programs. (T: 7306) Defendants' motions for a mistrial were similarly denied. (T: 7266)

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[9] The headlines included one entitled "Big Paul Stoolie Found Dead in Tex" (T: 7257-58; 7260), another entitled "Judge Urges the FBI Probe Into DiNome's Hanging" (T: 7375), a third entitled "Mad Dog Gets Lonely Trip to Stoolie Heaven" (T: 7375), as well as a New York Post article which concluded that "the mob may have been behind the mysterious death of Mr. DiNome." (T. 7316) Radio and television covered the incident as well. In point of fact, it was later determined that DiNome's death was, indeed, a suicide and not a homicide. (T: 7334)

[10] The defense also raised a serious question as to the source of the detailed information the media was providing to the public about DiNome's membership in the Witness Protection Program, the location and circumstances of his death, the type of rope he used to hang himself, as well as his cover name within the Witness Protection Program. (T: 7261-62; 7333-39) The trial judge himself admitted to being "more than a little" concerned about both the source and the content of these obvious press leaks (T: 7263), as it was clear that no one but the government had access to this information.

B. The District Court's Failure to Conduct an Individual Voir Dire of the Deliberating Jurors.

Confronted with serious allegations of substantially prejudicial news reports of the death of a government witness under mysterious circumstances during the course of the unsequestered jury's deliberations, the jurors should have been individually questioned. As this Court stated in *Dennis v. United States,* 339 U.S. 162, 171-72 (1950); "Preservation of the opportunity to prove actual bias is a guarantee of a defendant's right to an impartial jury."

Although Judge Duffy had discretion to determine the precise scope of the inquiry to be made -- and the nature of appropriate relief if prejudice was confirmed --he abused his discretion by refusing to conduct *any* individual inquiry of the jurors whatsoever. The brief and nonspecific general inquiry, as well as the oblique cautionary instruction which the Court gave to the jury, was clearly insufficient to eliminate the possibility of prejudice. *See, e.g., United States v. Pomponio,* 517 F.2d 460 (4th Cir.), *cert. denied,* 423 U.S. 1015 (1975). Plainly stated, Judge Duffy committed reversible error by failing to hold an inquiry sufficient in scope to expose any possible prejudice. *United States v. Rattenni,* 480 F.2d 195 (2d Cir. 1973); *United States v. Betner,* 489 F.2d 116 (5th Cir. 1974); *United States ex rel. Owen v. McMann,* 435 F.2d 813 (2d Cir. 1970) (Friendly, J.), *cert. denied,* 402 U.S. 906 (1971); *Coppedge v. United States,* 272 F.2d 504, 507-08 (D.C.Cir. 1959), *cert. denied,* 368 U.S. 855 (1961).

There can be no doubt that even if a proper inquiry had been held, reversal might well have been necessary. Indeed, under circumstances almost identical to the facts at bar. In *United States v. Titsworth, supra,* a new trial was granted after several jurors admitted having heard a news broadcast, during deliberations, referring to a government witness who had disappeared. *After personal inquiry of the jurors, and permitting counsel a similar opportunity, see* 422 F. Supp. at 589, the Court held that such inflammatory and prejudicial information,

not properly admissible or subject to confrontation or cross-examination, was inherently prejudicial, as it could not have failed to impress the jury, coming as it did at the crucial moment of deliberations:

> In the instant case, there is no dispute as to the fact that several jurors were exposed to information which was not subjected to confrontation, cross-examination or other safeguards guaranteed to the defendant. The extrinsic news items were not confined to some uncontroverted or merely formal aspect of the case. To the contrary, each item was of a crucial nature. It is true that evidence concerning the government's inability to locate Brenda Nelson had been admitted at trial. But the fact that her disappearance had become a subject of importance of a newscast may have placed undue emphasis on the materiality of such evidence in the minds of the jurors. The jurors could hardly fail to be impressed by a newscast about a missing witness in the case presently before them. Moreover, the news of "possible foul play" had been introduced by a juror into the jury room. Such information strongly suggested to the jurors that her disappearance had been the result of improper conduct on the part of the defendant, something this Court took great precautions to avoid.

422 F. Supp. at 590.[11]

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[11] Other courts similarly are in accord, particularly where the prejudicial material comes before the jury during deliberations -- clearly the most critical stage of the trial process. *See, e.g., United States v. Rattenni, supra; see also United States v. Montgomery,* 42 F.2d 254 (S.D.N.Y. 1930) (mistrial declared where four jurors read article describing defendant as a "swindler" and "jailbird"); *Coppedge v United States, supra* (error to deny mistrial motion when four jurors read article containing statement by prosecutor that defendant was "a vicarious criminal"); *United States v. Kum Seng Seo,* 300 F.2d 623 (3rd Cir. 1962) (error to deny new trial motion where, during

(footnote continued on following page)

Here, though, there was no inquiry, as there should have been, at all. Given the disastrously prejudicial and inflammatory information that the jurors already had absorbed surrounding the earlier murder of Paul Castellano, the mysterious death of one of the government's principal witnesses at the commencement of deliberations (and the attendant media circus that this new revelation provoked) called upon the trial judge to exercise painstaking care in exhaustively determining that no juror had either been exposed to -- or tainted by -- the publicity surrounding DiNome's death. This was particularly crucial in this case, where the media clearly implied that the defendants were responsible for it. Unfortunately, the trial court's simple generalized admonition for the jurors to stay away from newspapers and radios was a classic example of too little too late.

In affirming petitioner's conviction, the Second Circuit found, *first*, that the trial court had done something more than offer an admonition:

> [D]efense counsel again moved for a mistrial or, alternatively, an individual *voir dire* of the jurors. The district court denied these applications and conducted instead a general inquiry of the jury. In response to the question whether any of them had seen a newspaper that day, the jurors responded by shaking their heads "no". The court then emphasized repeatedly that they were to avoid

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(footnote continued from preceding page)
deliberations, jurors learned that defendant was held on $100,000 bail); *United States v. Gilbert*, 446 F.2d 559 (5th Cir. 1971) (error to fail to declare mistrial when court learned, after case went to jury, that one juror had read of defendant's prior trial for murder); *cf. United States v. Vita*, 294 F.2d 524 (2d Cir. 1961), *cert. denied*, 369 U.S. 823 (1962) (immediate substitution of alternate juror on second day of trial when court learned one juror had read article reporting defendant's prior conviction for robbery).

> media reports "at all costs." The trial judge believed that a deeper inquiry would only "fuel speculation" and "distract the jurors" from their deliberations.

(10a-11a) *Second*, the Court looked to the fact that the jury had been discriminating in its verdict, finding that "the jury's ability to render an impartial verdict is confirmed by the care which it took in its deliberations." (11a).

The problem with the Second Circuit's first reason is that the Court inaccurately characterized the trial record. What Judge Duffy stated was that he saw "a bunch of heads shaking no." (T: 7307) While this statement shows that no juror actually admitted to having seen the reports, it hardly establishes that there was an affirmative statement by each juror that no reports had been seen. *The record simply does not tell us whether all jurors shook their heads or whether some simply gave no answer.* It is for precisely this reason that an individualized voir dire was necessary. Given the prior admonitions not to read newspaper reports, some jurors might have been too embarrassed to admit in open court they had violated Judge Duffy's prior admonitions. *See Coppedge v. United States, supra* ("It is too much to expect from human nature that a juror would volunteer, in an open court, before his fellow jurors, that he would be influenced in his verdict by a newspaper story of the trial.")

As for the second reason -- the jury's discriminating verdict -- it is just as possible that such a verdict evidences the success of one or more nonbiased jurors in inducing their trial-weary associates to compromise rather than deadlock. Although a compromise verdict by an impartial jury would not be grounds for reversal, any verdict rendered by a jury containing even one biased juror surely must be set aside.

Further, any reliance on the "discriminating" verdicts rendered to somehow establish the jury's impartiality would be misplaced because, in many of the cases

in which the failure to inquire into possible juror bias has been held to require a new trial, the jury was equally "discriminating." *See United States v. Pomponio, supra* (two defendants convicted of all charges, two other defendants convicted of two counts, acquitted of two counts, and hung jury as to one count); *Silverthorne v. United States*, 400 F.2d 627 (9th Cir. 1968), *cert. denied*, 400 U.S. 1022 (1971) (both defendants acquitted as to conspiracy charge, both convicted as to approximately half of the other charges); *Coppedge v. United States, supra* (one defendant acquitted, one defendant convicted); *cf. United States v. Rattenni, supra* (jury reported deadlocked as to three of four defendants and as to all but one count for fourth defendant when mistrial declared); *Paz v. United States*, 462 F.2d 740 (5th Cir. 1972), *cert. denied*, 414 U.S. 820 (1973) (one defendant acquitted, eight other defendants convicted on at least some counts).

Given the possibility that the deliberating jurors had seen the adverse publicity surrounding DiNome's death -- indeed, that they probably had been unable to avoid it -- there is a colorable likelihood that the revelation (and the suspicion as to who was responsible) may have fatally tainted the deliberations, particularly where, as the jury well knew, this was not the only death connected with this case. There was only one way to ascertain whether this was so. The jurors should have been asked individually. As the Second Circuit has noted in precisely this context: "[S]unlight is said to be the best of disinfectants." *United States v. Moten*, 582 F.2d 654, 660 (2d Cir. 1978).

3.

Pursuant to Rule 19.4 of This Court, Petitioner Joins in the Arguments Contained in the Petitions of Co-Defendants Anthony Gaggi, Henry Borelli, and Edward Rendini Insofar as They Are Applicable to Him and Not Inconsistent With the Arguments Raised Herein.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment of the Court of Appeals for the Second Circuit.

Respectfully submitted,

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JUDD BURSTEIN
On the Petition

APPENDICES

Appendix A
Opinion of the United States Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 164, 165, 166, 167, 168, 169 — August Term 1986

(Argued October 6, 1986 Decided January 21, 1987)

Docket Nos. 86-1171, 86-1173, 86-1174, 86-1184, 86-1185 and 86-1186

Filed: January 21, 1987

UNITED STATES OF AMERICA,
Appellee,

v.

ANTHONY FRANK GAGGI, HENRY BORELLI, PETER LaFROSCIA, RONALD USTICA, EDWARD RENDINI and RONALD TUREKIAN,
Defendants-Appellants.

Before:
CARDAMONE and PIERCE, *Circuit Judges,* and BONSAL, *District Judge**

Defendants Gaggi, LaFroscia, Ustica, Turekian and Rendini appeal their judgments of conviction for conspiracy in violation of 18 U.S.C. § 371 entered in the United States District Court for the Southern District of New York (Duffy, J.) on April 9 and 11, 1986. Defendants Borelli, Ustica and Rendini appeal their convictions entered that same day under 18 U.S.C. § 2314 for

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* Hon. Dudley B. Bonsal, Senior Judge, United States District Court for the Southern District of New York, sitting by designation.

transporting stolen property in interstate and foreign commerce. Defendants Ustica and Borelli similarly appeal their 18 U.S.C. § 241 convictions; and defendant Turekian appeals his 18 U.S.C. § 1341 conviction.

Affirmed in part; reversed in part.

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Robert L. Ellis, New York, New York, *submitted Joint Brief for Defendant-Appellant Henry Borelli.*

Joel Winograd, New York, New York, *submitted Joint Brief for Defendant-Appellant Peter LaFroscia.*

Edward M. Chikofsky, New York, New York, *submitted Joint Brief for Defendant-Appellant Ronald Ustica.*

Judd Burstein, New York, New York, of counsel on Joint Brief, *for Defendants-Appellants.*

David S. Greenfield, New York, New York (Jonathan J. Silbermann, New York, New York, of counsel), *submitted brief for Defendant-Appellant Ronald Turekian.*

Appendix A
Opinion of the United States Court of Appeals

MARY LEE WARREN, Assistant United States Attorney, Southern District of New York (Rudolph W. Giuliani, United States Attorney, Southern District of New York, Michael Kellogg, Walter S. Mack, Jr., Warren Neil Eggleston, Assistant United States Attorneys, Southern District of New York, of counsel), *for Appellee, United States of America.*

Appendix A
Opinion of the United States Court of Appeals

CARDAMONE, *Circuit Judge*:

This appeal presents a trial record of a malevolent group of defendants, in the accomplishment of whose violent conspiracies no one was suffered to stand in the way. The problems raised by their trial are varied and complex, not merely on account of the number of those accused, but because two events -- one unexpected, one designed -- complicated the proceedings immeasurably. Unanticipated was the murder of defendant Paul Castellano on the streets of New York City, during the trial. The planned action was the government's decision to indict two defendants for conspiracy to murder two "persons" under a statute originally enacted in 1870 to protect citizens from discrimination. Although there is no charge that constancy be Congress' guiding star, it has for over 115 years steadfastly resisted all attempts to change the meaning of the word "citizen."

BACKGROUND

Defendants Anthony Gaggi, Henry Borelli, Peter LaFroscia, Ronald Ustica, Ronald Turekian and Edward Rendini appeal their judgments of conviction entered in the United States District Court for the Southern District of New York (Duffy, J.) on April 9 and 11, 1986, after a five and one-half month jury trial. On October 4, 1984, the government filed a 78 count indictment naming 24 defendants and alleging 11 different conspiracies. On September 9, 1985, Judge Duffy severed the indictment for the separate trials.[1] The trial at issue on this appeal comprises 23 counts of the original indictment relating

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[1] The case originally was assigned to District Court Judge Sofaer. *See United States v. Castellano*, 610 F. Supp. 1359 (S.D.N.Y. 1985).

to the defendants' stolen car ring involving ten individuals, six of whom are the defendants presently before us.[2]

The six defendants were variously charged with and convicted of one or more violations of 18 U.S.C. §§ 241, 371, 1341 and 2314. Section 371 makes illegal a conspiracy to transport stolen property in interstate and foreign commerce, and § 2314 proscribes the substantive crime of actually transporting such property. Section 241 makes it a crime to deprive any citizen of any right or privilege guaranteed by the Constitution or laws of the United States. Finally, § 1341 proscribes frauds perpetrated through the use of the United States mails.

The defendants, the various crimes with which they were charged, and the dispositions of the charges are as follows. The conspiracy under § 371 charged defendants with combining to ship late-model automobiles stolen on the streets of New York to Kuwait and other parts of the Middle East, Puerto Rico and other states in the United States. Gaggi, Ustica, LaFroscia, Rendini and Turekian were convicted of this conspiracy. Ustica, Borelli and Rendini were also convicted on a number of § 2314 counts; while Gaggi, LaFroscia and Turekian were acquitted on these counts. Borelli and Ustica were additionally convicted of conspiracy to deny citizens their civil rights in violation of § 241 for the murders of Ronald Falcaro and Khaled Fahd Darwish Daoud. Finally, Turekian was convicted of mail fraud in violation of § 1341 for submitting fraudulent claims to Aetna Insurance Company. An appendix included at the end of the opinion shows the charges for which each defendant was indicted, whether the charge resulted in a conviction or an acquittal, and the sentence imposed.

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[2] The other four named defendants were Joseph Testa and Anthony Senter, both acquitted by the jury, Richard Mastrangelo acquitted by the trial court at the close of the government's case, and Paul Castellano, whose murder during the trial is one of the principal issues raised on appeal.

Two of the six issues raised have already been alluded to -- the effect of publicity generated by a murder during trial and the conspiracy to commit murder. For organizational purposes the issues raised by appellants will be discussed in the following order: (I) publicity during trial, (II) civil rights murder conspiracy, (III) government's claimed misconduct under *Brady* and *Mooney*, (IV) evidentiary contentions, (V) jury instructions, and (VI) sentences.

DISCUSSION

I The Publicity During Trial

Two deaths occurred at different times during this lengthy trial prompting motions for mistrial, which were denied on each occasion. Appellants argue that the continued impartiality of the jury was destroyed by these events, and they urge further that the measures taken by the district court were inadequate to protect their rights to a fair trial.

It is not an uncommon occurrence for a notorious trial held in Metropoplitan New York to engender extensive publicity. The strong public interest in such trials has resulted in procedures to protect defendants' rights to a fair trial. In *United States v. Lord*, 565 F.2d 831 (2d Cir. 1977), we established guidelines for a district court to follow when the problem of widely disseminated publicity may prejudicially impact an ongoing criminal trial. The simple three-step process is, first, to determine whether the coverage has a potential for unfair prejudice, second, to canvass the jury to find out if they have learned of the potentially prejudicial publicity and, third, to examine individually exposed jurors -- outside the presence of the other jurors -- to ascertain how much they know of the distracting publicity and what effect, if any, it has had on that juror's ability to decide the case fairly. *Id.* at 838-39. Ultimately, the trial judge must examine

the "special facts" of each case, *United States v. Persico*, 425 F.2d 1375, 1382 (2d Cir.), *cert. denied*, 400 U.S. 869 (1970) (quoting *Marshall v. United States*, 360 U.S. 310, 312 (1959) (per curiam)), to determine whether the jurors remained impartial. *United States v. Gigante*, 729 F.2d 78, 82 (2d Cir.), *cert. denied*, 467 U.S. 1206 (1984). Absent a clear abuse of the trial court's discretion, its finding that the jury was impartial should be upheld. *United States v. Moon*, 718 F.2d 1210, 1219 (2d Cir. 1983), *cert. denied*, 466 U.S. 971 (1984); *see Marshall*, 360 U.S. at 312 (trial judge has large discretion in ruling on the issue of prejudice resulting from publicity). With these standards in mind, we turn to the events that occurred during trial and the safeguards taken by the district court.

A. The Murder of Paul Castellano

On December 16, 1985 two and one-half months into the trial, Paul Castellano -- the lead-named defendant in the indictment and one of the named defendants on trial -- was gunned down and killed in mid-town Manhattan while out on bail. Almost immediately news of the murder appeared in virtually every newspaper, radio, and television report in New York City. Two leading newspapers reported the incident, for example, as *Mafia's Number One Blown Away*, N.Y. Post, Dec. 17, 1985 at 2 and *Organized-Crime Chief Shot Dead Stepping From Car on E. 46th St.*, N.Y. Times, Dec. 17, 1985, at A1, col. 2. The reports of this killing and subsequent investigation did not subside for several weeks. Appellants contend, as they did below, that the jury's exposure to the concededly broad media coverage of this event required a mistrial.

The day after Castellano's death Judge Duffy conducted a separate *voir dire* of each juror, asking a number of questions regarding what, if anything, the juror had heard or seen about the murder. All of the jurors knew of it, and approximately six also had heard

that Castellano had been a head of an organized crime family. None had heard any comments regarding the nine remaining defendants or about the trial, except that Castellano was a defendant before them. All of the jurors stated that they would be able to decide the case fairly and impartially. *United States v. Gaggi,* 632 F. Supp. 1019, 1020-21 (S.D.N.Y. 1986).

Following arguments heard January 6, 1986, on defendants' motion for mistrial, Judge Duffy found that the publicity had "a potential for unfair prejudice," and therefore conducted a second individual *voir dire* of each juror, including questions suggested by defense counsel. *Id.* at 1021-22. The trial court concluded that the publicity was collateral in nature, and specifically found that none of the jurors had heard or read anything concerning the remaining defendants. All of the jurors stated unequivocally that their judgment would not be affected by the media reports and that they could decide the case solely on the evidence presented. *Id.* at 1022-23. As a result, the court ruled -- based in part on the jurors' responses and in part on its own assessment of the jurors' awareness of their responsibilities and obligations -- that the jury had not been prejudiced by the media reports.

The record thus reveals that the trial court complied in every respect with this Circuit's guidelines. For instance, in *Lord,* we held that the district court should not rely solely on repetitive admonitions when widespread publicity created a strong possibility that some jurors might have been exposed to prejudicial publicity. 565 F.2d at 838. In contrast, the district court here took prompt and effective corrective action. Once it saw "a potential for unfair prejudice," it held, not one but two, *voir dires* of each juror outside the presence of other jurors, to determine the extent of the juror's exposure to the reports and its effect on his or her attitude toward the

remaining defendants. Under these circumstances, the measures taken by the district court were adequate to insure a fair trial.

Nevertheless, appellants, relying on *Marshall v. United States*, 360 U.S. 310 (1959) (per curiam) and its progeny, insist that given the scope and intensity of the media coverage and despite the precautions taken, nothing short of a mistrial could have preserved their fair trial rights. Appellants stress in particular that the district court had been especially careful throughout the trial to avoid the introduction of references to the "Mafia," "Gambino family," and "organized crime." That precaution was shattered, appellants contend, by the jurors' exposure to those references in the media reports following Castellano's murder. We cannot agree.

It is the impartiality of the jurors -- not the quantum of publicity -- that determines whether the trial proceedings may be fairly conducted. *Dobbert v. Florida*, 432 U.S. 282, 303 (1977). Further, while appellants correctly observe that the jurors were exposed to references that Judge Duffy had properly sought to avoid, they fail to demonstrate how these concerns were not ameliorated by the two individual *voir dires*. As the Supreme Court has cautioned, "the Constitution 'does not require a new trial every time a juror has been placed in a potentially compromising situation.' " *Rushen v. Spain*, 464 U.S. 114, 118 (1983) (per curiam) (quoting *Smith v. Phillips*, 455 U.S. 209, 217 (1982)); *see United States v. Williams*, 568 F.2d 464, 470 (5th Cir. 1978) ("Obviously, reversal is not required in every case in which a news story containing facts inadmissible in evidence reaches the jury.").

Marshall is inapposite. There the Supreme Court held that the jurors' exposure to media coverage regarding the defendant's *own* prior criminal conviction, which the trial court had ruled was inadmissible because of its prejudicial effect, mandated a new trial despite assurances by the jurors that they would not be influenced by

the information. 360 U.S. at 312-13. Years later, the Supreme Court restated the *Marshall* rationale as: "persons who have learned from news sources of a defendant's prior criminal record are presumed to be prejudiced." *Murphy v. Florida*, 421 U.S. 794, 798 (1975). Here the district court made a clear finding that not a single juror had been exposed to information regarding the remaining defendants, and that the publicity therefore was collateral in nature. On that basis it concluded that the jurors were capable of deciding the issues before them fairly and impartially. Appellants' counsel conceded at oral argument that the publicity generated by the Castellano murder did not relate directly to the issues at stake in the ongoing trial. In contrast with *Marshall*, the publicity in the instant case did not relate to the remaining defendants' guilt with respect to the charges against them. The trial court took prompt action to determine the effect of that publicity and gave the jury repeated cautionary instructions. *See Gigante*, 729 F.2d at 82. Because the trial court is in a much better position to assess the partiality of a juror, it is inappropriate for an appellate court to second-guess that face to face appraisal.

B. The Death of Frederick DiNome

On February 17, 1986, about two months after Castellano's death -- after the trial had been concluded and while the jury was deliberating -- there were news reports detailing the apparent suicide of Frederick DiNome, one of the government's major witnesses who had testified earlier in the trial. As a result, defense counsel again moved for a mistrial or, alternatively, an individual *voir dire* of the jurors. The district court denied these applications and conducted instead a general inquiry of the jury. In response to the question whether any of them had seen a newspaper that day, the

jurors responded by shaking their heads "no." The court then emphasized repeatedly that they were to avoid media reports "at all costs." The trial judge believed that a deeper inquiry would only "fuel speculation" and "distract the jurors" from their deliberations. 632 F. Supp. at 1024.

Appellants now argue that the district court abused its discretion by not examining each juror individually. In support of this argument they mistakenly rely upon cases in which actual exposure to demonstrated prejudicial publicity required the district court to conduct an individualized *voir dire* of the jury. *See, e.g., United States v. Betner,* 489 F.2d 116, 118 (5th Cir. 1974); *United States v. Rattenni,* 480 F.2d 195, 197 (2d Cir. 1973); *United States ex rel. Owen v. McMann,* 435 F.2d 813, 815 (2d Cir. 1970, *cert. denied,* 402 U.S. 906 (1971); *United States v. Kum Seng Seo,* 300 F.2d 623, 624 (3d Cir. 1962); *Coppedge v. United States,* 272 F.2d 504, 507-08 (D.C. Cir. 1959), *cert. denied,* 368 U.S. 855 (1961); *United States v. Titsworth,* 422 F. Supp. 587, 589-90 (D. Neb. 1976). Yet, appellants also point to *Lord* where only a "strong possibility" of exposure existed, 565 F.2d at 838, and where we noted that in such cases something more than mere admonitions was required. *Id.* Here, the district court did "something more." It conducted a general inquiry satisfying itself that no actual jury exposure to prejudicial information had occurred. Thus, under our three-step process an individualized *voir dire* was unnecessary.

Moreover, we agree with the district court, 632 F. Supp. at 1024, that the jury's ability to render an impartial verdict is confirmed by the care which it took in its deliberations. *See United States v. Aiello,* 771 F.2d 621, 631 (2d Cir. 1985); *Gigante,* 729 F.2d at 82. Deliberations continued from February 13 through March 5, 1986. The jury made 56 requests asking for rereadings of testimony, exhibits, stipulations, and instructions. Its

verdict "ran the gamut" with 58 findings of guilty, 90 findings of not guilty, and a deadlock on two defendants on one count. 632 F. Supp. at 1024. Such a record reveals both an impartial and meticulous jury. Hence, we see no reason to disturb the district court's discretion in refusing to make more than a general inquiry regarding DiNome's death.

II The Civil Rights Conspiracy

Appellants Borelli and Ustica were convicted under 18 U.S.C. § 241 (1982) of conspiracy to deprive Ronald Falcaro and Khaled Fahd Darwish Daoud of the right to be federal witnesses. The jury found that the conspiracy caused the death of both men. Appellants claim that § 241 applies only to conspiracies to deny citizens their constitutional rights, and that Falcaro and Daoud were not proven to be citizens beyond a reasonable doubt. Consequently, they maintain that there is insufficient evidence as a matter of law to sustain their convictions. The government responds that the district court properly ruled that this statute does not limit its protection to citizens. For the reasons that follow, we conclude that United States citizenship is a necessary element under § 241.

A. Language of § 241

"Federal crimes, of course, 'are solely creatures of statute.' " *Dowling v. United States*, 473 U.S. 207, 105 S. Ct. 3127, 3131 (1985), (quoting *Liparota v. United States*, 471 U.S. 419, 424, 105 S. Ct. 2084, 2087 (1985)). For this reason, when analyzing the range of a federal criminal statute close heed must be paid to its language, construction, legislative history, and purpose in order to determine the scope of conduct the enactment forbids. The best starting point for examination of § 241 is -- as

that familiar canon of statutory construction instructs --the language of the statute itself. *Landreth Timber Co. v. Landreth,* 471 U.S. 681, 105 S. Ct. 2297, 2301 (1985); *Watt v. Alaska,* 451 U.S. 259, 265 (1981). "Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *Consumer Product Safety Commission v. GTE Sylvania, Inc.,* 447 U.S. 102, 108 (1980).

Entitled "Conspiracy against rights of citizens," § 241 makes it unlawful for "two or more persons [to] conspire to injure, oppress, threaten, or intimidate any *citizen* in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States . . . ." 18 U.S.C. § 241 (1982) (emphasis added). The statute specifically protects "citizens" against interference with their constitutional or federal statutory rights. Its language does not address harm aimed at "persons," "inhabitants," "residents," or "domiciles." When called upon to construe this statute, the Supreme Court stated that "§ 241 must be read as it is written." *United States v. Price,* 383 U.S. 787, 798 (1966). As a matter of common usage the term "citizen" is properly understood as a native or naturalized person who owes allegiance to a government and who is entitled to reciprocal protection from it. Thus, "[f]ollowing the axiom that words used in a statute are to be given their ordinary meaning," *Burns v. Alcala,* 420 U.S. 575, 580-81 (1975), (citing *Minor v. Mechanics Bank,* 26 U.S. 44, 63, 1 Pet. 46, 64 (1828)), § 241 is plainly limited by its language to redressing conspiracies against citizens.

B. Judicial Construction of § 241

As the Supreme Court has observed, inquiry into the proper construction of a statute does not necessarily end after ascertaining the plain meaning drawn from the face of the statute. *Watt v. Alaska,* 451 U.S. at 266; *Train*

v. Colorado Public Interest Research Group, Inc., 426 U.S. 1, 10 (1976). An examination of the caselaw construing § 241 is also appropriate.

A century ago, the Supreme Court answered the precise question before us today. In *Baldwin v. Franks*, 120 U.S. 678 (1887), the Court had before it a charge under § 241's identical predecessor statute based on a conspiracy to drive certain Chinese aliens from their California residences. Because the conspiracy was aimed at "alien" victims, the question arose: Who are the citizens of the United States to which the statute refers? The Supreme Court concluded: "it is everywhere apparent that Congress had it in mind to legislate for citizens, as citizens, and not as mere persons, residents or inhabitants." *Id.* at 691. *See also Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600, 661-62 n.36 (1979) (White, J. concurring) (discussing *Baldwin*); *United States v. Williams*, 341 U.S. 70, 81 n.7 (1951) (Frankfurter, J.) (reiterating the holding of *Baldwin*). The *Baldwin* court further explained:

> This section is highly penal in its character, ... It is, therefore, to be construed strictly; . . . doubtful words are not to be extended beyond their natural meaning in the connection in which they are used. Here the doubtful word is "citizen," and it is used in connection with the rights and privileges pertaining to a man as a citizen, and not as a person only or an inhabitant. . . . For these reasons we are satisfied that the word citizen, as used in this statute, must be given the same meaning it has in the Fourteenth Amendment of the Constitution, and that to constitute the offense which is there provided for, the wrong must be done to one who is a citizen in that sense.

120 U.S. 691-92.

Thus, the Supreme Court believed that since § 241 had been enacted in the wake of the Fourteenth and Fifteenth Amendments, it must be interpreted consistently with those Amendments. Section 1 of the Fourteenth Amendment defines "citizen" as "all persons born or naturalized in the United States." U.S. Const. amend. XIV, § 1. Reading the Fourteenth Amendment alongside *Baldwin*, we are persuaded that Congress meant to restrict prosecutions under § 241 to conspiracies against persons born or naturalized in the United States.

Moreover, in the 100 years that have passed since its original pronouncement, the Supreme Court has not seen fit to alter the view it expressed in *Baldwin*. In fact, not a single court -- with the exception of the district court here -- has held that the victim of a § 241 conspiracy need not be a "citizen." Instead, every court considering this issue has either stated or assumed that American citizenship is an element of proof under the statute. *See, e.g., United States v. Harris*, 701 F.2d 1095, 1102 (4th Cir.), *cert. denied*, 463 U.S. 1214 (1983); *United States v. King*, 587 F.2d 209, 211 (5th Cir.) (per curiam), *cert. denied*, 440 U.S. 972 (1979); *Wilkins v. United States*, 376 F.2d 552, 561 (5th Cir. 1967); *Powe v. United States*, 109 F.2d 147, 149 (5th Cir.), *cert. denied*, 309 U.S. 679 (1940); *United States v. Patrick*, 54 F. 338, 342-43 (C.C.M.D. Tenn. 1893); *United States v. Wheeler*, 254 F. 611, 624 (D. Ariz. 1918), *aff'd on other grounds*, 254 U.S. 281 (1920). Thus, in addition to the plain language of the statute itself, Supreme Court precedent requires an offense under § 241 to be committed against one who is a citizen.

C. Legislative History

The legislative history of § 241 further confirms our view concerning the proper construction of the statute. The section began its long history as § 6 of the Act of May 31, 1870, 16 Stat. 140, entitled "An Act to enforce

the Right of Citizens of the United States to vote in the several States of this Union, and for other Purposes." *See United States v. Williams*, 341 U.S. 70, 73 (1951). That Act, later known as the Enforcement Act of 1870, was passed only two months after the ratification of the Fifteenth Amendment. In addition to the new § 241, the Enforcement Act of 1870 included a re-enactment of § 17 of the Civil Rights Act of 1866, 14 Stat. 27, which today is § 242. *See Price*, 383 U.S. at 801-02. We recognize that originally the chief purpose of § 241 was to provide sanctions against interference with the right of Black citizens to vote, recently guaranteed them by the Fifteenth Amendment and to protect the exercise of that right against hostile groups, particularly the Ku Klux Klan. *See Williams*, 341 U.S. at 76, 89 (Douglas, J., dissenting). On the other hand, the genesis of § 242 derived, at least in part, from a desire to protect immigrant Chinese laborers from rampant discrimination aimed at them in California. *See United States v. Otherson*, 637 F.2d 1276, 1282, 1284 (9th Cir. 1980), *cert. denied*, 454 U.S. 840 (1981). In fact, Senator Stewart of Nevada in discussing the extension of the predecessor of § 242 to protect aliens,[3] explained: "The civil rights bill had several *other things applying to citizens* of the United States. This simply extends to foreigners, *not citizens*, the protections of our laws where the State laws deny them . . . equal civil rights." *Cong. Globe*, 41st Cong., 2d Sess. 1536 (1870), *quoted in Otherson*, 637 F.2d at 1282 (emphasis added). Thus, it was Congress' purpose

[3] Specific language in § 242, originally § 2 of the Civil Rights Act of 1866, was added in its re-enactment in the Enforcement Act of 1870 which made discrimination based on alienage an additional offense. *Compare* § 17 of the Act of May 31, 1870, 16 Stat. 144, *with* § 2 of the Act of April 9, 1866, 14 Stat. 27, both of which can be found in the Appendix to Opinion of Frankfurter, J., *United States v. Williams*, 341 U.S. at 83, which carefully traces the successive phraseology of §§ 241 and 242.

from the outset in enacting §§ 241 and 242 to address distinct evils aimed at different groups -- one citizens, the other inhabitants -- residing in the United States.

After the 1870 Act, what is now § 241 remained essentially unchanged. It next appeared in the Revised Statutes of 1874-1878 as § 5508, which was carried as § 19 without change into the Criminal Code of 1909, 35 Stat. 1092. In 1926, § 19 became § 51, 44 Stat. 462. The present day § 241 came from Title 18, United States Code Revisions of 1948. In none of the revisions or subsequent re-enactment is there any evidence of a congressional aim to alter the original scope of § 241. *Price*, 383 U.S. at 803. As Justice Frankfurter remarked in comparing § 241 with § 242: "To find this significance in the text of the Act of 1870 is not to give undue weight to differences in phraseology appearing in the statute. For the text of these sections has been considered by Congress not once but five times." *Williams*, 341 U.S. at 79. By its repeated reenactments of § 241 without substantive change after its judicial construction in *Baldwin*, Congress is presumed to have adopted that interpretation. *See Lorillard v. Pons*, 434 U.S. 575, 580 (1978); *Baldwin*, 120 U.S. at 691. Hence, Congress' original purpose "of securing and protecting the liberty of the citizen and the rights and immunities of American citizenship" remains the touchstone of § 241 today. *See Cong. Globe*, 41st Cong., 2d Sess., pp. 3611-3613 (Remarks of Senator Pool of North Carolina on sponsoring Section 6 of the Enforcement Act of 1870), *cited in* the Appendix to *Price*, 383 U.S. at 807, 812.

If there be doubt that the word "citizen" refers only to those who are citizens of the United States, a comparison of § 241 with § 242 aids in dispelling it. The two sections were enacted together in *pari materia*; § 242 makes it unlawful to "willfully subject [under color of law] any *inhabitant* . . . to the deprivation of any rights, privileges, or immunities . . . or to different punishments,

pains, or penalties, on account of such *inhabitant being an alien,* or by reason of his color, or race, than are prescribed for the punishment of *citizens.*" 18 U.S.C. § 242 (emphasis added). In enacting these two statutes at the same time, Congress expressly limited § 241 to "citizens"; but extended § 242's protection to "inhabitants."[4] We presume that the use of different terminology within a body of legislation evidences a Congressional purpose to differentiate. *See Lankford v. Law Enforcement Assistance Administration,* 620 F.2d 35, 36 (4th Cir. 1980); *United States v. Wong Kim Bo,* 472 F.2d 720, 722 (5th Cir. 1972) (per curiam).

When referring to the predecessors of §§ 241 and 242, the Supreme Court noted this difference: "Section 19 [241] protects the 'citizen'; 20 [242] the 'inhabitant'." *Williams,* 341 U.S. at 87 (Douglas, J., dissenting). Other circuit courts have also acknowledged the distinction. For example, in *United States v. King,* the Fifth Circuit, holding that a jail inmate was a "citizen" within the meaning of the statute, announced: "Section 241 protects citizens, whereas § 242 protects inhabitants." 587 F.2d at 211. Consequently, nothing in the language of § 241 or in its neighboring provisions of the same Title, supports the government's claim that § 241 encompasses conspiracies against individuals who are not citizens. On the contrary, a comparison of § 241 with § 242 demonstrates the opposite; that when Congress used the word "citizen," it intended no other meaning than that imparted by its choice of that term.

In fact, Congress has recently acknowledged the continuing vitality of the "citizen-inhabitant" distinction made in §§ 241 and 242. In 1980, the Senate Judiciary Committee issued -- as part of its many proposed reforms to the Criminal Code -- a report detailing recommendations to amend §§ 241 and 242. S. Rep. No. 553, 96th

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[4] For the historical development of the term "inhabitant" and the origins of 18 U.S.C. § 242, see *United States v. Otherson,* 637 F.2d 1276, 1279-85 (9th Cir. 1980).

Cong., 2d Sess. 461 (1980). Although the Committee's recommendations were not enacted into law, he report illustrates the narrow limits of prosecution under § 241 and, as a result, reinforces our conclusion.

In describing its proposed consolidation of §§ 241 and 242, the Committee remarked: "The former statute has been recast to protect all persons rather than just citizens." *Id.* It explained:

> The Committee has also somewhat expanded the reach of section 241 by eliminating the restriction that the victim be a "citizen." Instead, the citizen or non-citizen status of the victim will be irrelevant. The focus will be on the nature of the right, privilege, or immunity involved; if it is one secured by the Constitution or laws of the United States, the proposed statute will come into play. To be sure, cases in which the non-citizen status of the victim has prevented successful prosecution are few. The Committee, though, sees no reason for maintaining the limitation in view of the fact that aliens in this country are protected by an abundance of Federal constitutional and statutory provisions, and hence are likewise deserving of protection, by the operation of penal sanctions, against persons who deliberately seek to deprive them of those rights. Significantly, 18 U.S.C. 242 does not appear to be limited to a citizen-victim.

Id. at 464 (footnotes omitted). Despite the proposed amendment's lack of success in the 96th Congress, a similar bill, one which carried over the proposed unenacted language, was introduced in the next Congress. S.1630, 97th Cong., 1st Sess. § 1501 Cong. Rec. (1981). The purpose of this bill also was to expand the reach of § 241 by eliminating the restriction that the victim be a "citizen." S. Rep. 307, 97th Cong., 1st Sess. 489, 492 (1981). Once again the attempt to broaden § 241

failed. In fact, a later proposed amendment took out the "person" language and reinstated the original more restrictive "citizen" language of the present § 241. Amend. No. 1351 to S.1630, 128 Cong. Rec. 88 (1982). The original Senate bill and the proposed amendment to it were never enacted.

Thus, Congress has many times considered and each time *ultimately rejected* the exact expansion of § 241 sought by the government in this case. Consequently, we decline to amend this statute under the guise of construing it when Congress has refused. *See Fedorenko v. United States*, 449 U.S. 490, 513 (1981).

D. Government Arguments

Although we have set forth our view in some detail, the government has made two arguments that deserve further comment. First, while acknowledging *Baldwin*'s holding that the word "citizen" in § 241 must be given the same meaning it has in the Fourteenth Amendment, the government, citing *Plyler v. Doe*, 457 U.S. 202 (1982), points to the fact that the Fourteenth Amendment's protections have been applied to aliens since the *Baldwin* decision. Therefore, the government argues, under *Baldwin* itself the word "citizen" must now include "aliens." A close reading of *Plyler* reveals that the government's reliance is misplaced. That case held essentially that an alien is a "person" as that term is used in the equal protection clause of the Fourteenth Amendment. 457 U.S. 202, 210-16. It did not address the meaning of the word "citizen." In fact, both the equal protection and due process clauses, which in the recent past have been held to protect the rights of aliens present in this country, use the term "person." U.S. Const. amend. XIV, § 1. But, at the same time, the citizenship and the privileges and immunities clauses relied on by the Supreme Court in *Baldwin*, 120 U.S. at 690, define

and use the term "citizen." In short, the government's argument simply fails to recognize that the Fourteenth Amendment itself distinguishes between "persons" and "citizens."

Further, even were the strength of this distinction less apparent, a time-honored tenet of statutory construction directs that a court called upon to apply an ambiguous penal statute should not construe it in favor of sanctions, but strictly in favor of lenity. *See, e.g., Dowling,* 473 U.S. at ____ , 105 S. Ct. at 3132; *United States v. Bass,* 404 U.S. 336, 347 (1971); *United States v. Campos-Serrano,* 404 U.S. 293, 299 (1971) ("The principle of strict construction of criminal statutes demands that some determinate limits be established based upon the actual words of the statute."); *United States v. Margiotta,* 688 F.2d 108, 120 (2d Cir. 1982), *cert. denied,* 461 U.S. 913 (1983).

Finally, the government urges as a matter of policy that aliens who serve as federal witnesses should be entitled to reciprocal federal protection. But the protections of § 241 do not extend to non-citizens, however salutary such an extension may be. The problem -- being statutory, and not constitutional -- has been and presently is still subject only to congressional remedy. Consequently, while as a matter of policy such a change may be desirable, it is for Congress and not this Court to effectuate. *See Baldwin,* 120 U.S. at 692. Thus, for the reasons discussed, United States citizenship is a necessary element of proof under 18 U.S.C. § 241.

E. Proof of Violation of § 241

In light of our conclusion, the question remaining is whether the government demonstrated that either Falcaro or Daoud was an American citizen beyond a reasonable doubt. Khaled Daoud was a Jordanian citizen present in the United States on a non-immigrant visa at

the time of his murder. The citizenship of Falcaro is less clear. Falcaro's wife testified that at the time of his death her husband resided in Nassau County, was licensed by New York State as an automobile dealer, and paid both state and federal taxes. By special verdict, the jury found Falcaro to be an American citizen based on this testimony.

The evidence as to both victims fails to satisfy the government's burden of proof. Daoud is a Jordanian citizen, not an American citizen. And, although the jury found that Falcaro was a United States citizen, the evidence presented could as readily have proved either resident alien status or American citizenship. Consequently, no rational jury could have found Falcaro to be a citizen beyond a reasonable doubt. In light of the scant trial evidence on this issue, we hold that it was insufficient as a matter of law to support the convictions of appellants Borelli and Ustica under § 241. Accordingly, those convictions must be reversed.

III The Government's Alleged Misconduct

In his 1983 sworn statement and grand jury testimony, a key government witness, Dominick Montiglio, failed to implicate his uncle, defendant Anthony Gaggi, in the car theft conspiracy. But at trial Montiglio testified extensively regarding Gaggi's involvement in the cars-to-Kuwait ring. When cross-examined by defense counsel about his earlier silence, Montiglio replied that he had lied to the grand jury. Montiglio also stated that he had told the government about his "perjury" a week before he testified at the trial. On re-direct, the witness stated that in his earlier interviews with the government he had hoped by his silence to protect his uncle.

Appellant Gaggi contends that the government violated its duty under *Brady v. Maryland,* 373 U.S. 83 (1963), by failing to disclose Montiglio's "perjury." Such

failure, the defense maintains, led it to "open the door" to the damaging re-direct testimony of "protection-by-silence" that defense counsel would have avoided "at all costs." Gaggi further claims that the government knew that even Montiglio's explanation on re-direct was itself prejurious, and accordingly, that he is entitled to a new trial under *United States v. Agurs,* 427 U.S. 97 (1976).

A. The Government's Brady *Obligations*

Due process imposes upon the government an obligation to disclose material evidence favorable to an accused. *Brady,* 373 U.S. at 87. The duty to disclose encompasses not only exculpatory evidence, but also evidence that may be used to impeach a government witness. *Giglio v. United States,* 405 U.S. 150, 154 (1972). At the same time, "the prosecutor is not required to deliver his entire file to defense counsel." *United States v. Bagley,* ____ U.S. ____, 105 S. Ct. 3375, 3380 (1985). A new trial is required only if the government withholds *material Brady* evidence. *Bagley,* 105 S. Ct. at 3384.

Appellant Gaggi does not claim that the prosecutor improperly withheld exculpatory or impeachment evidence. Rather, the complaint is that the prosecutor failed to disclose evidence to the defense which, had it been aware of, it would have used to avoid Montiglio's damaging explanation on re-direct. Thus, the claimed error was the government's failure to disclose information that might have been helpful to the defense in conducting its cross-examination of a government witness. *See Bagley,* 105 S. Ct. at 3381.

As the government correctly observed, no *Brady* violation occurs if the defendant knew or should have known the essential facts permitting him to take advantage of any exculpatory evidence. *United States v. LeRoy,* 687 F.2d 610, 618 (2d Cir. 1982), *cert. denied,* 459 U.S. 1174 (1983); *United States v. Stewart,* 513 F.2d 957,

960 (2d Cir. 1975). Here, appellant Gaggi received trial copies of all of Montiglio's statements and interviews with the government and his testimony before the grand jury. From these documents defense counsel was able to draw his own conclusions regarding Montiglio's prior silence. The only "fact" defense counsel did not have was Montiglio's own characterization of his testimony before the grand jury as "perjury." Yet, while the government has a duty to be forthcoming with favorable evidence, it is not required to draw inferences from that evidence which defense counsel is in an equal position to draw. It was obvious to defense counsel that Montiglio's sworn trial testimony was totally at odds with his earlier sworn statements. When the road to what defense counsel thinks is potential perjury is so plainly marked, the government need not supply a map. We see no violation by the government of its *Brady* obligations.

B. The Government's Mooney *Duties*

Under *Mooney v. Holohan*, 294 U.S. 103, 112 (1935) (per curiam), the prosecution has a duty to refrain from eliciting and relying upon testimony known to be perjurious. A new trial is required if the government uses perjured testimony that is uncorrected and reasonably likely to have affected the outcome. *United States v. Agurs*, 427 U.S. at 103; *see Giglio*, 405 U.S. at 154.

Appellant Gaggi argues that Montiglio's explanation that he remained silent in 1983 to protect Gaggi is perjurious because Montiglio actually inculpated his uncle in serious crimes during both his grand jury testimony and his government interview. Gaggi maintains that the government, aware of this fact, knowingly relied on this perjurious testimony. The government, on the other hand, asserts that Montiglio never told it before trial that he had committed "perjury" in his earlier statements. Further, the government insists that Montiglio's explanation is truthful.

Ruling on this question below, Judge Duffy declined "to make a determination as to the credibility of Dominick Montiglio as a matter of law," preferring to leave this as a fact for the jury. We agree with the district court's disposition of this question concluding, as it did, that there is insufficient evidence in the record to permit a finding of perjury as a matter of law. Accordingly, Gaggi's *Mooney* claim must fail.

IV Evidentiary Contentions

Two evidentiary rulings of the district court are challenged. Such rulings are treated with deference on appeal, particularly with respect to questions of relevancy. *United States v. Southland,* 760 F.2d 1366, 1375 (2d Cir.) (Friendly, J.), *cert. denied,* 106 S. Ct. 82 (1985). Similarly, Fed. R. Evid. 403 gives the trial court broad discretion to weigh the probative value of evidence against its possible prejudicial effect and to determine whether, on balance, the evidence should be admitted to excluded. *United States v. Martinez,* 775 F.2d 31, 37 (2d Cir. 1985). Because the trial court is in a superior position to evaluate the likely impact of the evidence, its evidentiary rulings are seldom overturned. *United States v. Esdaille,* 769 F.2d 104, 108 (2d Cir.), *cert. denied,* 106 S. Ct. 258 (1985); *United States v. Robinson,* 560 F.2d 507, 514-15 (2d Cir. 1977) (en banc), *cert. denied,* 435 U.S. 905 (1978).

A. Borelli's New Jersey Conviction

On August 4, 1981 in the United States District Court for the District of New Jersey, Borelli pled guilty to participation in a car-theft conspiracy. Judge Duffy admitted that judgment of conviction into evidence against Borelli without a limiting instruction. Borelli claims that use of the conviction is barred by the terms

of his plea agreement. Alternatively he argues that the conviction was "other crimes" evidence, Fed. R. Evid. 404(b), that should have been accompanied by an instruction cautioning the jury against considering it as proof of his criminal propensities.

The first argument rests on a statement made by the District of New Jersey judge during a Rule 11 inquiry (Fed. R. Crim. P. 11(e)(1)(B)) to determine the court's acceptance of Borelli's plea. At one point that court stated:

> Your plea or offer to plead, as well as anything else you say here under oath in your lawyer's presence cannot be used against you in any criminal proceeding other than the one we're concerned with right now. Do you understand that?

Borelli's contention that this statement barred Judge Duffy from admitting his New Jersey conviction into evidence miscomprehends the nature of a Rule 11 inquiry. The statement made in the District Court of New Jersey signifies that any statements made by Borelli during his guilty plea allocution could not be used against him in a subsequent criminal proceeding. It does not mean that the government is forever foreclosed from proving the *fact* of conviction from the public records. Because the trial evidence challenged in the instant case consisted only of the fact of conviction, not the minutes of the guilty plea allocution, its use was not barred by Borelli's plea agreement.

Again, as the government correctly points out, the court in New Jersey read from the bench the following excerpt from Borelli's plea agreement: "The agreement further states that it's limited to the U.S. Attorney's Office in this district and cannot bind other Federal, state or local prosecuting authorities. That is the limit of their jurisdiction." We enforce such clauses. *See, e.g., United States v. Persico,* 774 F.2d 30, 33 (2d Cir. 1985).

Thus, Judge Duffy did not abuse his discretion in allowing the New Jersey conviction into evidence.

Moreover, appellant Borelli was not entitled to a "similar acts" or "other crimes" limiting instruction. His conviction was not admitted to show his criminal propensity, but was instead direct evidence of his involvement in the larger conspiracy. *See United States v. Paoli*, 603 F.2d 1029, 1035 (2d Cir.), *cert. denied*, 444 U.S. 926 (1979) (testimony regarding narcotics transaction was not "other crimes" evidence, but direct proof of the conspiracy charged.). Accordingly, no limiting instruction was required.

B. The Scorney Murder

Joseph Scorney, a car thief working with some members of the emerging cars-to-Kuwait scheme, was murdered by his accomplice Vito Arena in 1978. Defendant Turekian allegedly participated in the murder by serving as a "look-out," supplying the murder weapon, and assisting in the body's disposal. Testimony at trial revealed various possible reasons for Scorney's murder. For example, he had resisted the operation's change from a group of "local thieves" to a larger and more organized car theft ring, had threatened to kill another accomplice's children if anything happened to his car, was planning to "set-up" Arena so that Arena would be excluded from the operation, had refused to participate in the exportation of stolen cars and had caused tension and competition among the other street auto thieves by his presence.

The district court found the evidence concerning the Scorney murder relevant to the formation and early stages of the stolen car conspiracy because such testimony indicated that Scorney was murdered in order to "pave the road" for the participation of other more willing co-conspirators, such as Arena. Judge Duffy also

concluded that the evidence's probative value outweighed the danger of unfair prejudice. *See United States v. Birney*, 686 F.2d 102, 106 (2d Cir. 1982) (weighing these competing interests rests in sound discretion of trial court).

On appeal, Turekian argues that the district court's finding simply ignores Frederick DiNome's testimony that Scorney was "not killed over cars." Appellant maintains here, as he did below, that evidence of the murder was irrelevant to the stolen car charges on trial and that its admission was highly prejudicial. Even were this argument accepted at face value, it would not dispel the existence of other testimony linking Scorney's murder to the conspiracy. Because some of the reasons for Scorney being killed are relevant to the conspiracy's formation and development, the district court did not act arbitrarily or irrationally in admitting evidence of Scorney's murder. *See United States v. Tramunti*, 513 F.2d 1087, 1118 (2d Cir.), *cert. denied*, 423 U.S. 832 (1975) (co-conspirator's murder admissible as evidence of the means taken in furtherance of conspiracy goals.).

Finally, Turekian claims that without the evidence of his participation in the Scorney murder there is insufficient independent, non-hearsay evidence of his membership in the car ring to render declarations of co-conspirators admissible against him under *United States v. Geaney*, 417 F.2d 1116 (2d Cir. 1969), *cert. denied*, 397 U.S. 1028 (1970). As the evidence of Turekian's participation in the Scorney murder was properly admissible, we need not address this issue.

V The Jury Instructions

During deliberations the jury requested additional instructions on aiding and abetting. The trial court responded by giving a supplemental charge that included examples of stolen car offenses. One such illustration

focused on applying illegal emission stickers. Because his alleged participation in the conspiracy consisted mainly of supplying illegal emission stickers, Rendini claims that this supplemental charge unduly prejudiced him before the jury. Similarly, Turekian, who was convicted of mail fraud for submitting fraudulent insurance claims to Aetna, now argues that the district court's instructions on mail fraud improperly allowed the jury to find him guilty without the requisite *mens rea*.

The effect of these challenged instructions is determined in light of "the well-established proposition that a single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge." *Cupp v. Naughten*, 414 U.S. 141, 146-47 (1973). *Accord United States v. Gleason*, 616 F.2d 2, 14 (2d Cir. 1979), *cert. denied*, 444 U.S. 1082 (1980).

Taking up Rendini's challenge, it has been said that examples paralleling the facts of the case under consideration by a jury were disfavored. *See, e.g., Gleason*, 616 F.2d at 14; *United States v. Dizdar*, 581 F.2d 1031, 1037 (2d Cir. 1978). In the case at bar the example was highly analogous to the facts inculpating Rendini; as such it was more likely to be prejudicial than helpful, particularly when other non-prejudicial examples were available. Nonetheless, the error does not require reversal. Viewing the entire charge in context, the example given by the trial court loses any serious prejudicial effect. The jury was adequately advised of the law of aiding and abetting, and was warned repeatedly not to equate the examples given with the facts in the case before it. Moreover, other non-prejudicial examples were also provided. Thus, while the emission sticker example was ill-advised, whatever prejudice it may have occasioned was harmless when viewing the charge as a whole.

We also decline to upset Turekian's conviction. The mail fraud charge, viewed as a whole, was proper; in fact, it parallels the standard approved instructions on

this subject. *See, e.g., United States v. London*, 753 F.2d 202, 206-07 (2d Cir. 1985). The trial court in addition specifically instructed the jury that in order to find defendant Turekian guilty, it had to find that he "acted knowingly and willfully and with a specific intent to defraud." Hence, the charge properly instructed the jury on the requisite *mens rea* to convict the defendant for mail fraud.

VI The Sentences

Appellants Ustica, Borelli, and Rendini seek to vacate their sentences. They assert that the district court sentenced them in a mechanistic manner, failing to exercise its sentencing discretion. Rendini also argues that his sentence constitutes cruel and unusual punishment. Yet, absent a claim that the sentence was illegally imposed, in excess of the applicable statutory maximum, based upon materially incorrect information, or the result of a constitutionally defective sentencing procedure, ordinarily we decline to interfere with the exercise of a trial court's sentencing discretion. *United States v. Slocum*, 695 F.2d 650, 657 (2d Cir. 1982), *cert. denied*, 460 U.S. 1015 (1983); *accord Dorszynski v. United States*, 418 U.S. 424, 431 (1974) ("[O]nce it is determined that a sentence is within the limitations set forth in the statute under which it is imposed, appellate review is at an end.").

Looking first at appellant Ustica's sentencing allocution, the trial court did not act mechanistically in imposing concurrent five and ten year terms. It found that without Ustica's key role in the conspiracy as a car dealer "there could not have been a successful operation." Thus, it properly centered on Ustica's individual participation before sentencing him. Turning next to appellant Borelli, it was within the trial court's discretion to

impose consecutive 10-year sentences for each of this defendant's convictions under § 2314. Given that each count represented a discrete segment of Borelli's criminal activities, it was appropriate to impose a separate term for each conviction. With regard to appellant Rendini, who also received a ten year sentence for each § 2314 conviction, Judge Duffy particularly noted that Rendini supplied arms to his co-conspirators which were used in the commission of the homicides. Rendini's argument that his conviction and sentence resulted from *Pinkerton* principles of vicarious accessorial liability -- even if true -- is of no help to him. Consecutive sentences may properly be imposed upon such type of culpability. *See Pinkerton v. United States*, 328 U.S. 640, 645-48 (1946); *United States v. Crosby*, 314 F.2d 654, 657 (2d Cir.), *cert. denied*, 373 U.S. 923 (1963). In setting Rendini's sentence, the district court also considered Rendini's flagrant dealing in narcotics from the courthouse telephones during his trial. Under these circumstances, the district court plainly did in fact consider the individual role played by each defendant and acted within its discretionary power in imposing sentence. *See Dorszynski v. United States*, 418 U.S. at 431.

Finally, we must decide whether appellant Rendini's sentence is so disproportionate that it violates the Eighth Amendment. *United States v. Ortiz*, 742 F.2d 712, 714 (2d Cir.), *cert. denied*, 469 U.S. 1075 (1984). The factors to be considered in evaluating proportionality include the gravity of the offense, the harshness of the penalty, and the sentences imposed on other criminals for the same crime. *Solem v. Helm*, 463 U.S. 277, 292 (1983). The Supreme Court has warned that we should not substitute our judgment for that of the sentencing court, but when applying the Eighth Amendment to decide only whether the sentence is within constitutional limits; a review that rarely requires extended analysis. *Solem*, 463 U.S. at 290 n.16.

In considering the gravity of Rendini's offense, the violent nature of the car theft conspiracy, the danger it represented to the community, and the continued disrespect for the law Rendini exhibited by engaging in narcotics transactions during his trial are all strongly persuasive factors. Regarding the claimed harshness of the penalty, Rendini did receive the maximum statutory prison term, but he was not fined to the statutory limit. Although a review of similar sentences for the same crime reveals that his sentence is longer than the average sentence imposed in similar cases, the heavier sentence is properly justified by the particularly violent nature of the conspiracy. *See Ortiz,* 742 F.2d at 717 (a sentence which was double the average sentence imposed was not disproportionate). In sum, there is no constitutional basis for reversing the sentence imposed inasmuch as it falls within statutory limits and is not grossly disproportionate to the seriousness of the offense.

CONCLUSION

The judgments of conviction appealed from are all affirmed, except for appellant Ustica's and appellant Borelli's convictions under 18 U.S.C. § 241 which are reversed.

Judgment affirmed in part, reversed in part.

Appendix A
Opinion of the United States Court of Appeals

APPENDIX "A"

Defendants	*Indictments*	*Sentences*
Gaggi	§ Conspiracy -- Convicted --	5 years (§ 371) $10,000 fine
	§ 2314 Counts (Acquitted on all Counts)	--------
Ustica	§ 371 Conspiracy § 241 Civil Rights Count § 2314 Counts -- Convicted on all Three Charges -	Concurrent Terms of Life (§ 241) 10 years (§ 2314) 5 (§ 371)
LaFroscia	§ 371 Conspiracy -- Convicted --	5 years (§ 371)
	§ 2314 Counts (Acquitted)	--------
Borelli	§ 241 Civil Rights Count § 2314 15 Counts -- Convicted on Both Charges --	Consecutive Terms of Life (§ 241) +150 (§ 2314) (10 yrs per count)

APPENDIX "A" (continued)

Defendants	*Indictments*	*Sentences*
Rendini	§ 371 Conspiracy § 2314 16 Counts	Consecutive Terms of
	-- Convicted on Both Charges --	5 years (§ 371) +160 (§ 2314) $85,000 fine (10 yrs per count)
Turekian	§ 371 Conspiracy § 1341 Mail Fraud	Concurrent Terms of
	-- Convicted on Both Charges --	5 years (§ 371) (Mail Fraud)
	§ 2314 Counts (Acquitted on all Counts)	--------

Appendix B
Order of United States Court of Appeals On Petition for Rehearing and Suggestion for Rehearing In Banc

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 13 day of March, one thousand nine hundred and eighty-seven.

FILED: March 13, 1987

Docket Nos.
86-1171, 86-1173, 86-1174, 86-1184, 86-1185, 86-1186

UNITED STATES OF AMERICA,
Appellee,

-v.-

ANTHONY FRANK GAGGI, HENRY BORELLI, PETER LA FROSCIA, RONALD USTICA, and RONALD TUREKIAN,
Defendants-Appellants.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for Anthony F. Gaggi, Henry Borelli, Peter La Froscia, Ronald Ustica, and Ronald Turekian, defendants-appellants.

Upon consideration by the panel that heard the appeal, it is

Appendix B
Order of United States Court of Appeals
On Petition for Rehearing and Suggestion for
Rehearing In Banc

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

/s/ _____
Elaine B. Goldsmith
Clerk

Appendix C

Opinion of District Court

UNITED STATES of America

v.

Anthony Frank Gaggi, a/k/a "Nino"; Joseph Carmine Testa, Jr., a/k/a "Joey"; Patrick Testa, a/k/a "Patty"; Henry Borelli; Peter La Froscia; Anthony Michael Senter; Ronald Ustica, a/k/a "Ronnie"; Judith May Hellman; Wayne Hellman; Sol Hellman; Paul Dordal, a/k/a "Paulie Pinto"; Richard Mastrangelo, a/k/a "Richie"; Ronald Turekian, a/k/a "Bulldog"; Herman Weisberger, a/k/a "Hymie"; Edward John Rendini, a/k/a "Fast Eddie"; Joseph Guglielmo, a/k/a "Old Man Joe"; Douglas Rega; Pedro Luis Rodriguez, a/k/a "Pedro Paz"; Gus Kalevas; Salvatore Mangialino; Carlo Profeta, a/k/a "Carlos" and "Carmello"; Dennis Testa and Abdullah Mohammed Hassan Hussain, a/k/a "The Arab", Defendants.

No. SSS 84 Cr. 0063 (KTD).

United States District Court,
S.D. New York.

March 10, 1986.

In a prosecution for car theft conspiracy, defendants sought a mistrial after one defendant had been murdered. The District Court, Kevin Thomas Duffy, J., held that: (1) the publicity generated by the murder of one defendant did not entitle the remaining defendants to a mistrial, and (2) the apparent suicide of a government witness during deliberations did not entitle the defendants to a mistrial.

Motion for mistrial denied.

Appendix C

Opinion of District Court

Rudolph W. Giuliani, U.S. Atty. for the S.D. of N.Y., New York City (Walter S. Mack, Jr., Mary Lee Warren, Michael Kellogg, Asst. U.S. Attys., of counsel), for the U.S.A.

Michael Rosen, New York City, for defendant Anthony Gaggi.

Lipsitz, Green, Fahringer, Roll, Shuller & James, New York City (Herald Price Fahringer, of counsel), for defendant Joseph Testa.

Robert L. Ellis, New York City, for defendant Henry Borelli.

Joel Winograd, New York City, for defendant Peter LaFroscia.

Benjamin Brafman, New York City, for defendant Anthony Senter.

Hochheiser & Aronson, New York City (Lawrence Hochheiser, of counsel), for defendant Ronald Ustica.

Slotnick & Cutler, New York City (John Jacobs, of counsel), for defendant Richard Mastrangelo.

David S. Greenfield, New York City, for defendant Ronald Turekian.

Zerin & Cooper, New York City (Jay M. Zerin, of counsel), for defendant Edward Rendini.

OPINION

KEVIN THOMAS DUFFY, District Judge:

On December 16, 1985, at approximately 5:30 p.m., Paul Castellano and Thomas Bilotti were shot and killed by three assailants while exiting a car in front of Sparks Steak House on 46th Street between Second and Third

Avenues. A tremendous amount of publicity immediately followed concerning this incident. Since September 30, 1985, Castellano and nine others had been on trial before me on charges that, *inter alia*, they were all members of a car theft conspiracy. As a result of the enormous publicity generated by Castellano's death, the attorneys for the remaining defendants moved for a mistrial. On January 8, 1986, that motion was denied.[1] I shall now set forth my reasons for that denial as well as the subsequent denials of numerous mistrial motions made after January 8, 1986.[2]

On December 17, 1985, the day after Castellano was killed, I conducted a separate voir dire of each juror. They were asked a number of questions regarding what, if anything, they had heard or seen about Castellano's death and whether they believed they could still be fair and impartial as to the remaining defendants. All of the jurors knew of Castellano's death and basically how it came about. Approximately six of the jurors also had heard something to the effect that Castellano had been the head of organized crime. Without exception, however, none of the jurors had heard anything about the remaining nine defendants or about the trial, other than the fact that Castellano had been a defendant in it. The jurors all stated that they would still be able to decide the case fairly and impartially and that what they had learned about Castellano would in no way affect their ability to judge the other defendants.

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[1] Desiring to avoid any further publicity in this case, I withhend publication of this opinion until after the completion of the trial.

[2] Although the publicity regarding this case decreased substantially after the January 8, 1986, decision was announced, when there were newspaper articles or radio reports that defense counsel perceived as potentially prejudicial to their clients mistrial motions and requests for an individual voir dire of the jurors were made.

Appendix C

Opinion of District Court

Following the voir dire, I requested defense counsel to gather together the transcripts of the T.V. and radio broadcasts that some of the jurors had indicated they had seen or heard. Defense counsel informed me that it would take at least a few days to get this material to me. Accordingly, as it had always been my intention to suspend the trial over Christmas and New Year's weeks, I adjourned all proceedings until January 6, 1986 at which time I heard arguments on the mistrial motion. In the interim, there were numerous newspaper articles and T.V. and radio reports regarding Castellano's murder. This publicity included details about the killings and speculation about Castellano's background and the cause and possible ramifications of his death. The publicity surrounding Castellano's death did not abate for quite a few days, in part due to the fact that certain law enforcement personnel considered it appropriate to be highly visible and conduct numerous interviews wherein they discussed their various theories for Castellano's death, and also because the media reported that the Archdiocese of New York denied a Mass of Christian Burial for Castellano.

At oral argument on January 6, 1986, defense counsel highlighted the following areas of publicity which they considered to be the most prejudicial: (1) references to Castellano's position as the alleged leader of the Mafia; (2) references to the fact that the defendants in the instant case are to be tried on many other charges in later trials;[3] (3) discussions regarding the costs of

[3] The indictment in this case originally charged 24 defendants with 78 counts including eleven separate substantive conspiracy counts. In addition to the automobile related offenses which were the subject of this first trial, there are narcotics, extortion, prostitution, firearms, civil rights, and RICO offenses charged in the indictment. Because I did not consider it possible for me to give all of the defendants a fair trial with such an indictment, I divided the case into a number of areas with the first trial involving the automobile related charges. Trials on the remaining charges will now follow.

organized crime to the community; (4) coverage of the fact that the Catholic Church, through Cardinal John J. O'Connor, assertedly denied a Mass of Christian Burial for Castellano;[4] (5) allusions to other defendants on trial;[5] (6) references to electronic surveillance in Castellano's home; and (7) suggestions that Castellano may have been killed because it was feared that he was about to become an informant or that he was going to be found guilty in this trial. As I stated at the January 6, 1986

---

[4] The initial reports in the media carried the story as set out in the text above. However, in Cardinal O'Connor's column in *Catholic New York*, there appeared the following:

> *Question:* Why did you refuse to permit Mr. Castellano to be buried in a Catholic cemetery?
>
> *Answer:* I did not refuse burial in a Catholic cemetery. The family of Mr. Castellano asked that he be buried in Moravian Cemetery on Staten Island. That's where he was buried. I authorized and requested that a Catholic priest be present at the graveside with the family, to say the prayers and to bless the grave. Hundreds of Catholics are buried in Moravian Cemetery by choice.
>
> *Question:* Why did you forbid a Mass for Mr. Castellano?
>
> *Answer:* I did not forbid a Mass. I forbade only the presence of the body. I asked Bishop Ahern, my Episcopal Vicar for Staten Island, to offer Mass with the family present, in his own church on Staten Island, following the funeral. Thus what could have been a public spectacle was avoided, and in my judgment, a considerable amount of scandal was also avoided.

O'Connor, *The Castellano Case*, Catholic New York, Jan. 2, 1986, at 5.

[5] Anthony Gaggi was mentioned as an alleged "capo" or "captain" and the "only defendant of alleged rank" remaining in the trial. It was also noted that Richard Mastrangelo, Peter LaFroscia, and Edward Rendini are incarcerated.

hearing, this publicity was clearly harmful. However, that there has been prejudicial publicity regarding an ongoing criminal trial is not the determinative factor when considering whether to declare a mistrial. Rather, it is only the first element of a multi-step procedure that a district judge must follow when deciding a mistrial motion.

In *United States v. Lord*, 565 F.2d 831, 838 (2d Cir. 1977), the Second Circuit set forth "[t]he guidelines to be followed by a district court confronted with the problem of publication or broadcast of information concerning an ongoing criminal trial . . . ." The procedure is as follows:

> First, the court must decide whether the publicity contains potentially prejudicial information, and whether the members of the jury might have been exposed to it. If the broadcast or article contains no information beyond the evidence in the case, or if the information is clearly inocuous or the possibility of the jury's exposure to it is remote, further inquiry may not be necessary. If however, the court determines that the article or broadcast has a potential for unfair prejudice, then an initial inquiry of the jury is necessary to ascertain whether any of its members have been exposed to the information. Any juror who responds that he or she has been so exposed should be examined individually, out of the presence of the other jurors, to determine the extent of the exposure and its effect on the juror's attitude toward the trial.

United States v. Lord, 565 F.2d at 838-39 (footnote omitted). The court went on to explain that "[t]his precautionary procedure should permit the court to determine what further steps, if any, are required to insure that the trial proceeds fairly." *Id.* at 839.

Given my conclusion that the publicity disseminated throughout the community over the three week period following Castellano's murder had "a potential for unfair prejudice," it was incumbent upon me to conduct another voir dire of the jurors. Because of the pervasive nature of the publicity, I decided to proceed under the assumption that the jurors would be unable to avoid the publicity at least to some extent. Thus, I chose to start immediately with a separate voir dire of each juror "to determine the extent of the exposure and its effect on the juror's attitude toward the trial."

[1] The voir dire of the individual jurors lasted the entire day on January 7, 1986. I found the jurors to be sincere and candid in their responses to detailed questions regarding what they had seen or heard since Castellano's death and what their present impressions were as to the remaining defendants. The jurors exhibited a conscientious desire to avoid the publicity regarding this case and an insightful understanding of the irrelevance of any publicity that they were exposed to. Not one juror heard or saw anything that gave him or her the impression that the remaining nine defendants were involved in organized crime. In fact, no one heard or saw anything at all about the remaining nine defendants or the trial. Although many of the jurors stated that they did hear something about the Cardinal denying Castellano a public mass, interestingly most volunteered that they disagreed with the Cardinal's action and all affirmed that it would have absolutely no effect on their ability to give the remaining defendants a fair trial. Many of the jurors indicated that they remembered one or more of the theories being suggested for why Castellano was murdered. However, without exception, all of the jurors were unequivocal in their belief that their judgment had not been affected by Castellano's death and the ensuing publicity and that they remained fair

and impartial and could decide this case solely on the evidence presented at trial.

Defendants relied heavily on *United States v. Rattenni*, 480 F.2d 195 (2d Cir. 1973), in support of their mistrial motion. However, that case is easily distinguishable from the present one. In *Rattenni*, after the jury reached a guilty verdict against Nicholas Rattenni on the conspiracy count of the indictment, but before they reached a verdict regarding any of the remaining defendants and charges, certain members of the jury heard a radio broadcast that referred to Rattenni's prior conviction. During a voir dire conducted by the trial judge in which the jurors were asked about the radio broadcast, one juror, Mrs. Metz, "readily admitted her prejudice against Rattenni on the remaining open charges against him as well as on all of the charges against his codefendants." *Rattenni*, 480 F.2d at 196. Mrs. Metz also informed the judge that, prior to the guilty verdict against Rattenni on the conspiracy charge, she had read an article in the New York Daily News about Rattenni. This article also referred to Rattenni's conviction on a prior indictment. "[T]he trial judge never asked [Mrs. Metz] explicitly whether she had been prejudiced by the Daily News story," *Rattenni*, 480 F.2d at 197, but rather simply declared a mistrial as to all of the open charges and refused to set aside the guilty verdict as to Rattenni on the conspiracy count. The Second Circuit held that a retrial of the conspiracy count was necessary essentially because Mrs. Metz "was never asked if the article biased her and made no such disclaimer *sua sponte*" and, in fact, the logical inference was that she had been prejudiced before the verdict against Rattenni had been rendered. *Rattenni*, 480 F.2d at 198. Thus, unlike the instant case where a complete

and detailed voir dire was conducted[6] and each juror stated positively that he or she had not been prejudiced and could remain fair and unbiased, *Rattenni* involved a situation where a juror admitted she would be prejudiced diced in all future deliberations and, though not explicitly questioned on the subject, where, in all likelihood, she had been prejudiced in her prior deliberations.

Similarly, the other cases cited by defendants are also unpersuasive. Generally, these cases involved either acts of juror misconduct, *see United States v. Delaney,* 732 F.2d 639, 631 (8th Cir. 1984); *United States v. Hillard,* 701 F.2d 1052, 1063 (2d Cir.), *cert. denied,* 461 U.S. 958, 103 S. Ct. 2431, 77 L.Ed.2d 1318 (1983), or juror exposure to publicity "that was probative of guilt and highly prejudicial," *United States v. Williams,* 568 F.2d 464, 470-71 (5th Cir. 1978); *see also Marshall v. United States,* 360 U.S. 310, 311-12, 79 S. Ct. 1171, 1172-73, 3 L.Ed.2d 1250 (1959). In the present case there was no juror misconduct and the publicity the jurors were exposed to was collateral in nature.

Although the publicity which surrounded this trial is unfortunate and the cause of the surge in publicity in mid-December tragic, a mistrial is not the appropriate solution as long as the jurors can remain fair. The Supreme Court has stated:

> due process does not require a new trial every time a juror has been placed in a potentially compromising situation. Were that the rule, few trials would be constitutionally acceptable. The safeguards of juror impartiality, such as *voir dire* and protective instructions from the trial judge, are

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[6] The voir dire consisted of questions suggested by defense counsel as well as my own questions, some of which were modeled after those asked by Judge Dooling in *United States v. Persico. See United States v. Persico,* 425 F.2d 1375, 1380-81 n.8 (2d Cir.), *cert. denied,* 400 U.S. 869, 91 S. Ct. 102, 27 L.Ed.2d 108 (1970).

> not infallible; it is virtually impossible to shield jurors from every contact or influence that might theoretically affect their vote. Due process means a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen.

Smith v. Phillips, 455 U.S. 209, 217, 102 S. Ct. 940, 946, 71 L.Ed.2d 78 (1982). I denied defendants' mistrial motion on January 8, 1986 because I found the jurors in this case to be sincere in their proclamations that their impartiality had been unaffected by the publicity and because I adhered to the Supreme Court's observation that "[o]ne may not know or altogether understand the imponderables which cause one to think what he thinks, but surely one who is trying as an honest man to live up to the sanctity of his oath is well qualified to say whether he has an unbiased mind in a certain matter." *Dennis v. United States*, 339 U.S. 162, 171, 70 S. Ct. 519, 523, 94 L.Ed. 734 (1950), *quoted in Smith v. Phillips*, 455 U.S. at 217 n. 7, 102 S. Ct. at 946 n. 7.

[2] After the January 8, 1986 denial of defense counsel's mistrial motion, the publicity regarding this case was minimal through to the time the jury began deliberations on February 13, 1986. On February 17, 1986, however, while the jury was still deliberating, there were radio reports and newspaper articles detailing the circumstances of the apparent suicide of Frederick DiNome, one of the government's major witnesses during the trial. That same day, I conducted a general inquiry of the jury to determine whether they had been exposed to this publicity to which they indicated that they had not. I went on to emphasize to the jury, as I had done repeatedly throughout the trial, that they were "to avoid at all costs newspapers and radio programs." Tr. 7306.

Thereafter, over the next few days, there were additional articles in the local newspapers regarding DiNome's death. During this time, at the jury's request, the jury was deliberating an average of twelve hours a day, from 10:00 a.m. to 10:00 p.m. They were, without question, one of the most responsible and conscientious groups of people I have ever encountered. Throughout the remainder of their deliberations, I reminded the jury again and again of the importance of avoiding the news in any form. On a number of occasions defense counsel requested that because of the publicity about DiNome I declare a mistrial or conduct an individual voir dire of the jurors. I denied these requests, however, because the jurors had already sufficiently demonstrated their steadfast allegiance to the court and its instructions. I concluded that subjecting the jurors to the "third degree" in the midst of their deliberations was unwarranted and, if anything, would simply fuel speculation that something significant relating to the case had happened and thus only serve to distract the jurors from the arduous task already before them.

Perhaps the most significant evidence that the jury had not been affected by any of the publicity generated during the trial was the jury's verdict and the length of its deliberations. The verdict ran the gamut from fifty-eight findings of guilty to ninety findings of not guilty to being deadlocked on two defendants on one count. The jury deliberated from February 13 through March 5, 1986 and sent out fifty-six notes asking for many hours of testimony to be read back, exhibits, stipulations, and rereadings of the jury charge. After the trial was over, members of the jury were heard to say, *inter alia*, that Castellano's death and anything they had heard regarding Castellano did not enter into their deliberations at all and that the defendants could not have had a more fair jury. Although, of course, I cannot personally verify

the former statement, as to the latter, to my view, there can be no doubt.

In sum, for the reasons set forth above, all of defendants' applications for a mistrial due to prejudicial publicity were denied.

SO ORDERED.